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ABSTRACT

This teaching guide is designed to accompany and enhance a two-part Public Broadcasting System video documentary about the U.S. Supreme Court's history, legal processes, and activities. The purpose of this series is to examine the institution that for 200 years has been the principal custodian of the U.S. Constitution. A background essay, written by Richard Cortner, highlights: (1) the establishment of the federal judiciary system; (2) the Supreme Court's decision-making powers; and (3) the Supreme Court's history and role in shaping U.S. law. A section entitled "Profiles of the Justices" contains brief autobiographical sketches of recent Supreme Court judges. A lesson plan is provided for each of the two television programs, "A History of the Court" and "Inside the Supreme Court," and contains: (1) learning objectives; (2) a program synopsis; (3) suggested previewing and postviewing activities; and (4) student research-related activities. A glossary of terms, 34 selected resource materials, and a list of the Supreme Court chief justices are included. (JHP)

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THIS HONORABLE COURT

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Teacher's Guide

Dear Teacher:

When the Supreme Court of the United States convened for its first term in 1790, it quickly adjourned because no cases were on its docket, and only four of the justices were in attendance. The first chief justice, John Jay, resigned after five years to become Governor of New York. And when President John Adams asked him to once again serve as chief justice in 1800, Jay refused the office, saying that he had left the Court "perfectly convinced that under a system so defective, it would not obtain the energy, weight and dignity which are essential to its affording due support to the National Government, nor acquire the public confidence and respect which, as the last resort of the justices of the nation, it should possess."

Despite its initial inauspicious entry into the life of the nation, the subsequent history of the Supreme Court has proven John Jay's prediction of the Court's future to have been seriously mistaken. Indeed, the Court has become the world's most powerful judicial body. Although the decisions of the Supreme Court affect the lives and liberties of all Americans, it is nevertheless the least understood of the three branches of our national government.

What are the reasons for the lack of public understanding of the Court and its work? One is that, while the Court is an institution of government, it is also a court of law whose work primarily involves the interpretation of federal laws and the Constitution, subjects which tend to be thought of as rather mysterious by the general public and as being in the specialized domain of lawyers and judges. The fact that the Court carries out its decision making removed from the pressures of open debate only serves to underscore the mystery surrounding its work. Furthermore, the Court has been limited by the Constitution to the role of arbiter of legal and Constitutional issues, leaving Congress and the executive branch as the main engines of governmental innovation and policymaking.

Until the production of THIS HONORABLE COURT, television for the most part had been an unfriendly stranger looking in from the outside, a bystander to history in the making. Cameras had been permitted only brief glimpses inside the Court building. The justices themselves, limited, by the nature of their work, in their ability to communicate with the public and to answer their critics, made infrequent television appearances. The PBS documentary represents a breakthrough in helping the public understand better the Court's place in history and what transpires in the great marble temple on Capitol Hill. Our public television series peels away some of the veils of mystery to give Americans a closeup look at the institution which for some 200 years has been the principal custodian of the Constitution and its freedoms.

Chief Justice William Rehnquist gave his wholehearted endorsement and cooperation to the project. So did the other justices. The result was a series of scenes in which the justices not only discuss the Court's work but also provide insights into their own thinking about the legal system.

We also interviewed law clerks, Court assistants, reporters, scholars, historians, and Justice Department officials who deal with the Court. To capture the Court's work through the ages, we traveled to the site of the Court's first session in 1790 in New York (now a busy street intersection), to Philadelphia where the Court met for ten years, and to St. Louis where the infamous *Dred Scott* case began.

We believe THIS HONORABLE COURT affords the public an unprecedented opportunity to become better acquainted with the nation's highest tribunal of justice. It also serves to illuminate the role the Court has played in shaping the evolution of constitutional government in the United States and in the maintenance of individual liberty under law.

Paul Duke

How to Use This Guide

This Teacher's Guide to THIS HONORABLE COURT is designed to enhance classroom use of the two-part series. The **Background Essay,** written by Richard Cortner, Professor of Political Science at the University of Arizona, provides the teacher with an overview of the history of the Supreme Court as well as a description of the actual workings of the Court. Reading the essay before introducing the programs to the students is strongly recommended, since it provides a concise frame of reference, both for your own viewing and for any immediate postviewing discussion with students.

The activities in the guide are designed to extend the students' viewing experience and to broaden their understanding of material presented in the programs. The **Previewing Activities** give students some historical background and other information that can be helpful in understanding the content of each program. The **Focus Question** for each program provides a framework for the students' viewing.

The **Postviewing Discussion** questions derive directly or indirectly from material in the programs and are meant as springboards for discussion. The **Research Activities** give the students the opportunity to explore in depth some of the issues raised in the programs. Because of space restrictions, the lists of questions and activities are necessarily limited. Some teachers may choose to use the activities and questions as they are written here; others may want to modify them or add others to suit the abilities and interests of their students.

Profiles of the Justices contains brief profiles of the current Supreme Court justices. Lewis F. Powell, Jr., is included here since he was filmed for the program before his retirement in 1987.

The **Glossary** at the back of the guide contains commonly used legal terms which are especially helpful to know when studying Supreme Court cases.

The **Resource List** is divided into books, periodicals, and video and film material on the Supreme Court. Where a title is not self-explanatory, an annotation has been added to describe the contents.

Teachers are encouraged to reproduce material from this guide for their students.

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THIS HONORABLE COURT

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Additional copies of this guide and videocassettes of the program can be purchased from WETA-TV. Please write or call WETA-TV, Department of Educational Activities, P.O. Box 2626, Washington, DC 20013, 800/445-1964 or 703/998-2709.

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Establishing the Federal Judiciary

The Supreme Court's contemporary institutional practices are the product of a long process of historical evolution. The Articles of Confederation, the frame of government under which Americans lived from the end of the Revolution until 1789, did not provide for national judicial institutions.[1] National laws and policies were totally dependent upon the courts and officials of the states for their enforcement. The national government had no means of its own by which it could enforce its laws and policies directly upon individuals within the states. This lack was one of the most glaring defects of the Articles and was addressed by the framers of the Constitution when they assembled in Philadelphia, Pennsylvania, in the summer of 1787.

The Structure of the Judiciary

When the Constitution emerged from the Philadelphia convention in 1787, it contained Article III which provided for a national judiciary. But Article III was notably incomplete, reflecting the compromises in the convention as well as the failure of the framers to agree precisely upon what the shape of the national judiciary should be.

Early Judicial System

Article III did provide for one Supreme Court, thus making the Court the only constitutionally required national court. The Article also spelled out the type of cases that go directly to the Supreme Court. But by and large, Article III left to Congress the decision regarding the nature and structure of the national judicial system.

Crucial decisions consequently faced the first Congress which met under the Constitution in 1789. Congress questioned whether there would be lower federal courts through which national laws would be enforced, or whether national laws would continue to be enforced through the state courts with review of the state courts' decisions by the Supreme Court on appeal. Congress passed the Judiciary Act of 1789, deciding that lower federal courts would indeed be created.

The act provided for thirteen federal district courts, one for each of the states in the Union. In addition, the act divided the states into three geographical circuits. The circuit courts would rotate from state to state in each geographical area. Each district court would be presided over by a federal court judge. Each circuit court would be presided over by the U.S. district court judge in whose district the circuit court was sitting and by two Supreme Court justices. Thus Supreme Court justices were assigned dual roles under the Judiciary Act of 1789. They served on the Supreme Court for part of each year, and during the remainder of the year they "rode the circuit." Circuit-riding duty, requiring Supreme Court justices to travel long distances under frequently hazardous circumstances, continued to be a responsibility of the justices for most of the nineteenth century.

In the Judiciary Act of 1789, Congress also addressed the question of the Supreme Court's appellate jurisdiction. The act provided that the Supreme Court would hear appeals from the U.S. circuit courts, which in turn would hear appeals from the district courts. And in a crucial provision, section 25 of the act, Congress provided that the Supreme Court would have jurisdiction to hear appeals from the state courts when the decision involved the interpretation of federal laws or the Constitution, ensuring that the Supreme Court would be the final interpreter of federal laws and the federal Constitution.

Creation of the Modern Court

No factor has had a greater impact upon the Supreme Court as an institution than its workload. The workload was relatively light prior to the Civil War, but the number of cases being appealed to the Court following the war soon overwhelmed its decision-making capacity.

Congress eventually responded to the Court's caseload problem by enacting the Court of Appeals Act of 1891. At long last the justices were relieved of their circuit-riding responsibilities. In addition, the act added a circuit court of appeals in each circuit to hear appeals from the U.S. circuit courts and district courts—appeals that previously would have gone directly to the Supreme Court. It was believed that many litigants would be satisfied with this appellate review of their cases, and thus the number of appeals being carried to the Supreme Court would be reduced.

The U.S. courts of appeals became a permanent feature of the structure of the federal judiciary. Presently there are thirteen U.S. courts of appeals, eleven of which sit in the eleven geographical circuits into which the country is divided. Two courts of appeals sit in the District of Columbia. The Court of Appeals for the Federal Circuit essentially hears and decides technical cases, such as patent appeals. The Court of Appeals for the District of Columbia Circuit hears large numbers of cases having significant impact upon national policy, and thus it is regarded as second in importance to the Supreme Court.

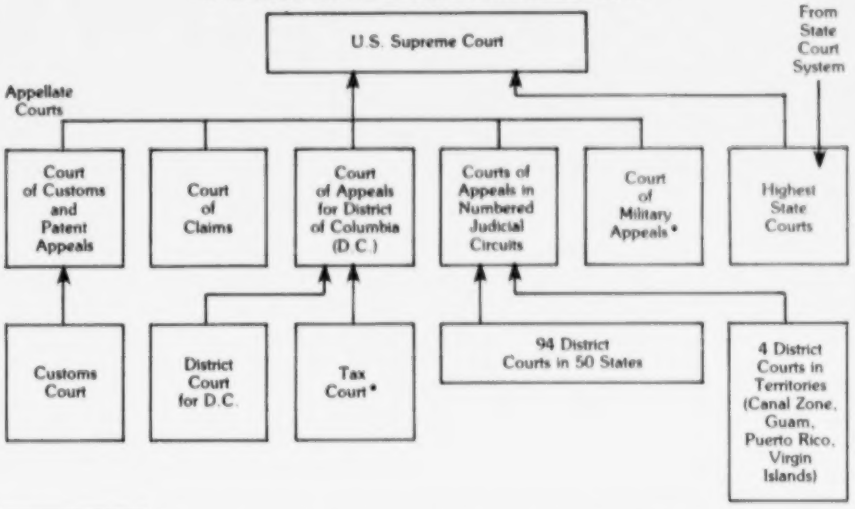
Congress acted in 1911 to abolish the circuit courts and transferred their jurisdiction to the U.S. district courts. The U.S. district courts then became the principal trial courts in the federal judicial system, and the modern process of litigation in the federal courts was established.

After World War I the Supreme Court once again became overburdened with cases, largely due to litigation growing out of the war, the expansion of the activity of the federal government, and the business and commercial development of the country. William Howard Taft, who became chief justice in 1921, was an avid advocate of judicial efficiency and reform. He soon appointed a committee of the justices which was charged with the responsibility of formulating legislation to make the Court's caseload once again manageable. The committee of justices produced a legislative proposal that became the Judiciary Act of 1925, popularly known as "the Judges' Bill."

The act was based on the idea that the Supreme Court should be permitted to commit its decision-making resources to the decision of public law cases, or those raising issues of broad impact upon the nation, such as cases involving the interpretation of federal statutes and the Constitution. In order to permit the Court to do this, however, it had to be given the choice of deciding which of the cases on its **docket** were important enough to decide on their **merits.** The Judiciary Act of 1925 accomplished this by requiring that almost all cases being appealed to the Court should be appealed by **petitions** for **writs of certiorari.** Since granting a writ of certiorari

[1] An exception was the Court of Appeals in Cases of Capture, but this court had no significant domestic jurisdiction.

Federal Court Structure


U.S. Supreme Court
From State Court System
Appellate Courts
Court of Customs and Patent Appeals
Court of Claims
Court of Appeals for District of Columbia (D.C.)
Courts of Appeals in Numbered Judicial Circuits
Court of Military Appeals*
Highest State Courts
Customs Court
District Court for D.C.
Tax Court*
94 District Courts in 50 States
4 District Courts in Territories (Canal Zone, Guam, Puerto Rico, Virgin Islands)

* Neither the Tax Court nor the Court of Military Appeals is part of the federal judicial system. The Tax Court is an administrative agency and is part of the executive branch. The Court of Military Appeals is part of the government of the armed forces.

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was a discretionary act on the part of the Court, the act gave the Court for the first time discretionary control over its docket, allowing it to choose which cases it desired to hear and decide, and to refuse to hear those cases it did not want to hear.

After 1925, therefore, the Supreme Court could limit its decision making to important cases of its own choice, primarily cases involving the interpretation of the Constitution and federal statutes. The Judiciary Act of 1925 thus created the modern Supreme Court as it functions today.

The Justices

How Many Justices?

Article III did not specify how many justices should compose the Supreme Court. This decision was made by Congress in the Judiciary Act of 1789—that the Court would consist of a chief justice and five associate justices. As the nation expanded geographically and with the creation of more U.S. circuit courts by Congress, the number of Supreme Court justices needed to serve on the circuit courts also increased. The number of justices on the Court reached nine by 1837 and reached an all-time high of ten in 1863.

In the clash between President Andrew Johnson and Congress over reconstruction policy following the Civil War, Congress reduced the authorized number of justices to seven (although the actual number never fell below eight) as a means of denying Johnson appointments to the Court. Following Johnson's departure from the presidency, Congress again provided that the Court should consist of nine justices. Nine has remained the congressionally authorized number of justices since 1869.

The fact that the Constitution itself does not specify the number of Supreme Court justices leaves open the possibility of the manipulation for political purposes of the number of justices on the Court, as was the case during President Andrew Johnson's tenure. The most notable attempt in this direction was President Franklin Roosevelt's "court-packing" proposal in 1937. He proposed that Congress should increase the Court to fifteen justices, as a means of eliminating the Court's resistance to his New Deal measures. The court-packing plan was rejected by Congress, ending what had been the most serious direct confrontation between a president and the Court in our history. Congress' defeat of the court-packing plan set a precedent that is likely to discourage similar attempts in the future.

Selecting Supreme Court Justices

The framers of the Constitution intended that the Supreme Court and the federal judiciary as a whole should have a high degree of independence from the political process that bears directly upon the other branches of the government. For that reason, the framers provided that federal judges would have life tenure during good behavior and that Congress would be prohibited from diminishing the compensation of the judges. By providing that Supreme Court justices be appointed by the president, subject to the advice and consent of the Senate, the framers of the Constitution nevertheless ensured that political considerations would directly affect the Court through the appointment process.

The Process. In the president's selection process, the attorney general, the Department of Justice, and the White House staff normally play a significant role in screening possible candidates. Potential nominees are also subjected to a Federal Bureau of Investigation (FBI) background check. Another practice, begun under President Dwight D. Eisenhower, is to submit possible nominees to the American Bar Association's (ABA) Committee on the Federal Judiciary. The committee rates the nominees according to the bar association's criteria. A finding that a potential nominee is unqualified often weighs heavily against the selection of that nominee by the president. Once the president's selection has been made, the Senate must consider the nominee and decide whether to consent to the appointment. Normally, all presidential nominations are considered by the Senate Judiciary Committee, which receives the ABA's rating of the nominee as well as the results of the FBI investigation. The committee may hold hearings to receive the testimony of witnesses either supporting or opposing the nomination. Since the 1930s, it has become customary for the nominee to also appear and testify. The Judiciary Committee may decide in four ways:

- by voting against the president's choice and choosing not to report the nominee to the full Senate for its consideration.
- by voting against the nominee but reporting the president's choice to the Senate with a recommendation that the Senate not confirm the appointment.
- by reporting the nomination to the full Senate without recommendation.
- by voting in favor of the nomination and recommending to the full Senate that it confirm the nomination.

Selection Criteria. The factor that most influences the president's selection of a Supreme Court justice is whether the potential justice shares the president's ideological or philosophical values. All presidents have sought to ensure that their appointments to the Court will interpret the law and the Constitution in a compatible manner with those values.

Despite the care most presidents have taken to seek out ideologically compatible justices, it has not been infrequent for a justice once on the Court to disappoint the appointing president. Oliver Wendell Holmes, Jr., Theodore Roosevelt thought, was in broad agreement with himself on most issues confronting the country. After Justice Holmes voted against Roosevelt's antitrust policy, however, Roosevelt reportedly remarked that he could carve a judge with more backbone than Holmes out of a banana. And President Eisenhower was reported to have been keenly disappointed with the liberal rulings of his appointees, Chief Justice Earl Warren and Justice William Brennan. President Richard Nixon must also have been disappointed with three of his appointees to the Court, Chief Justice Warren Burger and Justices Harry Blackmun and Lewis Powell. They joined in a unanimous opinion of the Court which rejected Nixon's claim that executive privilege allowed him to refuse to surrender tape recordings of his conversations relevant to the Watergate proceedings. Although another of his appointees, Justice William Rehnquist, disqualified himself from sitting in *United States* v. *Nixon* (1974), the Court's ruling in that case eventually led to Nixon's resignation from office.

When circuit-riding remained a responsibility of Supreme Court justices, the geographical residence of a Supreme Court nominee was an important factor in the selection of justices, but geographical considerations appear to have receded in importance in recent years. During part of the twentieth century, the religion of nominees to the Court was considered important in some cases, and there was thought to be a "Jewish seat" and a "Catholic seat" on the Court. Religion as a factor in selecting members of the Court also appears to have been reduced. But considerations of race, ethnicity, and sex have become more important. Future presidents are thus likely to be under considerable pressure to replace Justice Thurgood Marshall, the first black to be appointed to the Court, and Justice Sandra Day O'Connor, the first female justice, with a black and a woman.

As President Washington discovered when the Senate rejected his nomination of John Rutledge to be chief justice in 1795, confirmation of the president's nominees to the Supreme Court by the Senate is by no means an automatic process. Indeed, throughout our history, approximately one in five presidential selections to the Court has been rejected by the Senate. In the twentieth century alone, six potential justices selected by the president have either been rejected by the Senate or have been withdrawn by the president in the face of senatorial opposition that indicated almost certain rejection of the nominee.

President Herbert Hoover was the first twentieth century president to have a nominee to the Court rejected by the Senate when John J. Parker's nomination was defeated in 1930. President Lyndon Johnson's nomination of Abe Fortas to be chief justice was withdrawn in 1968 in the face of a likely rejection in the Senate. President Richard Nixon's nominations of Clement Haynsworth and of G. Harrold Carswell in 1969 to fill the vacancy on the Court left by Justice Fortas' resignation also were defeated in the Senate. And in 1987, President Reagan suffered a similar twin defeat. Reagan's nomination of Robert H. Bork was defeated in the Senate, while his subsequent selection of Douglas Ginsburg was withdrawn after his confirmation seemed doomed. Only after these two defeats did President Reagan win Senate confirmation of Anthony Kennedy as a member of the Court. Despite disavowals by senators that the ideological orientation of a potential justice is largely irrelevant in the confirmation process, ideological considerations were of substantial importance to the defeats or withdrawal of all of the presidential selections that have failed in this century.

The Power to Decide

The framers of the Constitution provided for the power of the Supreme Court and the federal judiciary in Article III. Article III provides that the judicial power of the United States extends to all cases and controversies arising under the Constitution, laws, and treaties of the United States. Article III grants power to the Supreme Court and the federal judiciary, but also places limits upon the exercise of that power.

Limitations to Power

The Constitution, Laws, and Treaties of the United States

By limiting the power of the Supreme Court and lower federal courts to cases and controversies arising under the Constitution, laws, and treaties of the United States, Article III prohibits the federal courts from second-guessing state courts on the meaning of state law, since the state courts are the final interpreters of the meaning of state law. This means that vast numbers of cases are heard and decided by the state courts and are never reviewed by the federal courts.

Justiciable Cases and Controversies Only

Article III also limits the exercise of judicial power by the federal judiciary to the decision of cases and controversies alone. The courts are thus commonly said to lack a "self-starter." Before the federal judiciary can exercise its power, there must be before the judiciary a real case or controversy involving two parties with adverse legal interests which a court is capable of resolving.

The cases and controversies requirement also prohibits the Supreme Court or lower federal courts from giving advice or an advisory opinion, because advice on a legal or constitutional issue does not involve a case or controversy as required by Article III. The Supreme Court, therefore, held early in its history that it could *not*, upon request by the president, Congress, or anyone else, give advice or an advisory opinion.

The Supreme Court has prescribed the characteristics that must be present for a real case or controversy to exist. A case or controversy which is appropriate for resolution by an exercise of federal judicial power must be a **justiciable case** or **controversy. Justiciability** is determined by several factors.

Standing to Sue Rule. The parties in the case must first of all possess standing to sue, frequently referred to as **standing.** To have standing in a case a **litigant** must demonstrate that he or she has or is about to suffer a real, personal, legal injury in fact and, therefore, has a concrete stake in the outcome of the litigation. Without standing to sue on the part of litigants, no justiciable case or controversy within the meaning of Article III exists, and federal judicial power may not be exercised.

The Mootness Rule. The issues in a case must not be **moot**—the issues must not have become settled by the passage of time or changed circumstances. *Roe* v. *Wade* (1973), for example, set a precedent regarding the mootness rule. Roe was challenging a Texas antiabortion statute which prevented her from terminating her pregnancy. By the time her case reached the Supreme Court, Roe was no longer pregnant because of the time consumed by the litigation in her case. Technically her case involved moot issues since she no longer had an immediate interest in challenging the Texas antiabortion statute. The Court ruled, nonetheless, that the *Roe* case presented an exception to the general rule that it will not decide moot issues. When litigation depends upon a circumstance, such as a woman's pregnancy, which is capable of repetition yet which would always evade review by an appellate court because of the shortness of time in which the circumstance exists, the Court held that an exception to the mootness rule should be made. And the Court proceeded to review the *Roe* case on the merits.

Ripe for Decision Rule. The issues in a case must also be **ripe for decision** by a court. For an issue to be ripe for decision, it would have to have a concrete impact on the litigants. The Court will dismiss cases raising unripe issues on the ground that a case or controversy does not exist. In *Roe* v. *Wade*, for example, a couple intervened in the case and joined Roe in attacking the constitutionality of the Texas antiabortion statute. The couple alleged that the woman could not take birth control pills for medical reasons; that she might, therefore, become pregnant in the future; and the couple was financially and emotionally unprepared to rear a child. The Supreme Court held that the couple's allegations were conjectural and hypothetical. The woman might never become pregnant, the Court pointed out, and even if she did, she might not opt for an abortion. To decide the issues raised by the couple's complaint would be to decide unripe, hypothetical issues that did not present a justiciable case or controversy as required by Article III. The Court thus dismissed the couple's complaint as raising issues beyond its power to decide.

Political Question Rule. Finally, the issues in a case must not constitute what the Court calls a political question, a question that the Constitution has delegated to Congress or to the president for ultimate resolution or a question for which there are no judicially manageable or administerable standards for the decision. For example, a suit seeking an order of the Court to compel the president to recognize diplomatically a foreign government would be dismissed by the Court as raising a political question. The Constitution delegates to the president alone the power to decide which foreign governments will be diplomatically recognized by the United states. Such a suit, the Court would rule, raises a nonjusticiable, political question beyond the power of the federal judiciary to decide under Article III's cases and controversies requirement.

A political question is not an issue that if decided by the Court would have a political impact. Most decisions of the Court will have that effect.

Decision Making in the Supreme Court

For purposes of illustration, we will follow one case, *Edwards* v. *Aguillard*, through the decision-making process in the Supreme Court. *Edwards* v. *Aguillard* involved a constitutional challenge to the Louisiana Creationism Act (Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act) which was adopted by the Louisiana legislature in 1981. This act prohibited the teaching of the theory of evolution in the Louisiana public schools unless such teaching was accompanied by instruction in "creation science," which emphasized the belief in the existence of a supernatural creator. Don Aguillard was joined by parents of children attending Louisiana public schools and Louisiana teachers and religious leaders, with the support of the American Civil Liberties Union (ACLU), in attacking the Creationism Act in the U.S. District Court for the Middle District of Louisiana. They argued that the act promoted religion in violation of the First Amendment's Establishment Clause requiring the separation of church and state, as applied to the states via the Due Process Clause of the Fourteenth Amendment. The U.S. district court sustained this argument. Louisiana Governor Edwin W. Edwards, and the other defendants who had lost in the district court, appealed the district court's decision to the U.S. Court of Appeals for the Fifth Circuit. The court of appeals, however, affirmed the decision of the district court. Governor Edwards and the others then appealed the case of *Edwards* v. *Aguillard* to the U.S. Supreme Court, where it was decided on June 19, 1987.

Avenues to the Court

The Supreme Court possesses both original and appellate jurisdiction to hear cases. The **original jurisdiction** of the court is almost exclusively confined to cases involving suits between states. While it is important to have a forum to settle these legal disputes, the issues involved in those cases frequently do not have broad national significance.

The most numerous and significant cases decided by the Court reach it under its **appellate jurisdiction.** These cases have been reviewed in the lower federal or state courts, with the losing litigants seeking further review in the Supreme Court.

How a Case Moves Through the Supreme Court

1. The petition arrives at Court.
2. A law clerk reads the petition and writes a summary memo for the justices to read.
3. The case has at least one justice place it on the Discuss List, which is circulated by the chief justice's office.
4. In conference the justices discuss whether or not to review the case; the "rule of four" applies, *i.e.*, at least four justices must vote to review the case.
5. Parties in the case are notified and must file briefs with the Court; the case is scheduled for oral argument.
6. Oral argument; each side is allotted thirty minutes.
7. Case conference; justices meet in private to discuss and decide on the case.
8. Opinion writing; one of the justices is assigned to write a majority opinion; others may draft a dissenting or a concurring opinion.
9. The final opinion is announced and published.

Presently, cases reach the Supreme Court under its appellate jurisdiction by two methods—petitions for writs of certiorari and appeal.[1] Approximately 95 percent of the cases reach the Court via petitions for writs of certiorari. Although there are technical differences between appeals and certiorari cases, the Court processes both types of cases in essentially the same manner.

In a certiorari case, the party seeking review of a case by the Court (called the petitioner) files a petition for a writ of certiorari. The party that has won the case in the court below (the respondent) will normally file a brief in opposition to the grant of the petition for a writ of certiorari. In an appeal case, the party seeking review of a lower court decision (the appellant) will usually file a jurisdictional statement, and the winning party in the lower court (the appellee) will usually file a motion to dismiss or affirm.

Petitions for writs of certiorari and jurisdictional statements are short, written arguments by attorneys seeking to convince the Court that the issues decided in the court below are sufficiently important for the Court to decide. **Briefs** in opposition to certiorari and motions to dismiss or affirm are also short, written arguments. They attempt to convince the Court that the issues were correctly decided by the court below or are lacking in significance and the Court should thus deny further review.

In *Edwards* v. *Aguillard*, the attorneys for Edwards filed a jurisdictional statement, because decisions by the U.S. courts of appeals that invalidate state statutes fall within the very limited number of cases which go to the Supreme Court by appeal rather than by petition for a writ of certiorari. The attorneys for Aguillard, who had won the case in the court of appeals, then responded by filing a motion to dimiss or affirm the case.

Petitions for writs of certiorari and jurisdictional statements seeking Supreme Court review of cases are filed by attorneys for litigants who can afford to pay for the litigation of their cases. However, the Court also receives large numbers of petitions by persons, usually incarcerated prisoners, who cannot afford to pay the cost of an appeal. These persons file **in forma pauperis** (ifp) petitions, which are frequently handwritten pleas for Supreme Court review of a prisoner's case. Until the 1930s, the Court largely ignored in forma pauperis petitions. But Chief Justice Charles Evans Hughes began the practice of treating them as normal appeals, and that practice has been continued by the Court.

In forma pauperis petitions usually raise frivolous, even bizarre, issues, and they constitute approximately half of the almost 5000 petitions seeking Supreme Court review. Occasionally, however, an ifp petition will raise meritorious issues. One example is Clarence Earl Gideon's contention in a handwritten ifp petition that he had been denied the right to counsel at his trial for a felony in the Florida courts. The Court treated Gideon's ifp petition as a petition for a writ of certiorari and appointed Abe Fortas, later a justice himself, to argue Gideon's case. In *Gideon* v. *Wainwright* (1963), the Court ruled that the states must appoint counsel for all indigent defendants in serious criminal cases under the Sixth and Fourteenth Amendments of the Constitution. Since he had been denied counsel, Gideon's conviction in the Florida courts was reversed.

The Role of Clerks

Because of the enormous task of processing the almost 5000 petitions for certiorari, jurisdiction statements, ifp petitions, briefs in opposition to the granting of certiorari, and motions to dismiss or affirm, the justices rely heavily upon their clerks in the task of deciding which cases they wish to hear and decide on the merits. Clerks were not employed by the Court until Justice Horace Gray began the practice of hiring a clerk to assist him in 1882, and the other justices eventually followed Gray's example. Each justice now has three or four clerks to assist in conducting the work of the Court. The clerks are normally recent law school graduates with outstanding records, and they ordinarily serve in the court for only one year.

One of the most important functions of the clerks is to read and summarize in one- or two-page memos the issues involved in the petitions seeking the Court's review. With the purpose of expediting the work of the Court, some of the justices in recent years have pooled their clerks, and the clerks' pool circulates memos to the chambers of the justices participating in the pool.

In addition to aiding in the screening of the Court's cases, the clerks also do research on the opinions the justices are writing, and, depending upon the practice of the justice to whom they are assigned, may even draft the opinions themselves. Because of this reliance upon the clerks, their influence on the decision making in the Court has occasionally been a subject of concern.

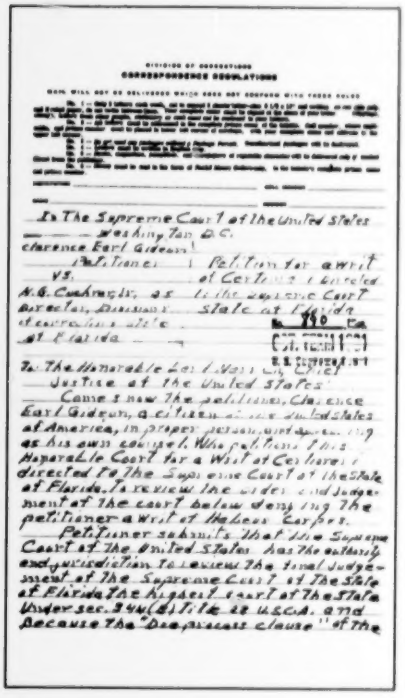
Discuss and Dead Lists

Before the justices decide which cases should be heard on the merits and which should be dismissed, the chief justice's office circulates a Discuss List and a Dead List. On the Discuss List are those cases deemed worthy of review, while the Dead List contains those cases which are considered unworthy of review. Any case, however, may be added to the Discuss List from the Dead List by any of the justices. Nevertheless, most cases seeking the Court's review end up on the Dead List. Only a small number of cases, fewer than 200 out of almost 5000, survive beyond this point in the Court's decision-making process. The typical Supreme Court case is, therefore, one in which the Court denies review.

Deciding to Review

In *Edwards* v. *Aguillard*, one or more of the justices obviously considered the case to be worthy of discussion and it was added to the Discuss List. And in a conference of the justices, at least four of the justices voted to review the case on the merits. It is the custom of the Court to allow a minority of the justices, four of the nine, to control which cases it will review—a custom called the *rule of four*.

[1]The U.S. courts of appeal may also certify legal or constitutional questions to the Supreme Court for decision. This process is called certification, but its use is insignificant as a means of seeking Supreme Court review when compared to appeals and petitions for writs of certiorari.



In the Supreme Court of the United States
Washington, D.C.
Clarence Earl Gideon,
Petitioner,
vs.
H.G. Cochran, Jr., as Clerk Supreme Court Director, Division of State of Florida
Respondent.
To: The Honorable Earl Warren, Chief Justice of the United States
Comes now the petitioner, Clarence Earl Gideon, a citizen of the United States of America, in proper person, and appearing as his own counsel, who petitions this Honorable Court for a Writ of Certiorari directed to the Supreme Court of the State of Florida, to review the order and judgment of the court below denying the petitioner a writ of habeas corpus.
Petitioner submits that the Supreme Court of the United States has the authority and jurisdiction to review the final judgment of the Supreme Court of the State of Florida, the highest court of the State under sec. 344(b) Title 28 U.S.C.A. and because the "Due process clause" of the

In forma pauperis petition filed by Clarence Earl Gideon. Source: National Archives

Following the conference, the Court published an order indicating that in *Edwards* v. *Aguillard* "probable jurisdiction is noted." This is the manner in which the Court indicates in an appeal case that four members of the Court have voted to hear the case on the merits. If four justices had not voted in favor of hearing the *Edwards* case, the Court would have entered an order stating that the appeal was dismissed for want of a substantial federal question. If the *Edwards* case had been a case coming to the Court on petition for a writ of certiorari, and it had received four votes in conference, an order would have been entered stating that the petition for a writ of certiorari was granted. But if the case had not received four votes in conference, an order stating that the petition for a writ of certiorari was denied would have been entered. Since 95 percent of the cases coming to the Court are certiorari cases, the overwhelming majority of cases appealed to the Court end with the Court denying the petition for a writ of certiorari.

Briefs

After the Supreme Court agrees to review a case on the merits, the parties are notified and required to file briefs that seek to convince the Court to decide the case favorably.[3] Parties not directly involved in cases to be decided on their merits at this stage frequently file **amicus curiae** (or friend of the court) briefs, seeking to influence the Court's decison of a pending case. Indeed, the amicus curiae brief is one of the most frequently used devices by which interest groups and individuals seek to affect the Court's decision of cases. *Edwards* v. *Aguillard*, for example, attracted several such amicus curiae briefs.

Oral Arguments

After the briefs in a case are filed with the Court, a case which the Court has agreed to review is scheduled for oral argument. The oral argument of cases in the courtroom of the Supreme Court building is the only aspect of the Court's decision-making process that is open to the public.

During the nineteenth century, it was not uncommon for oral arguments to extend over several days in a given case, but with the modern increase in the Court's caseload, the time allotted to attorneys for oral argument has been reduced in most cases to thirty minutes for each side. Attorneys cannot expect to deliver an uninterrupted speech during oral argument, since the justices typically interrupt the arguments to seek more information on the case being argued than might be revealed in the written briefs filed by the attorneys. Rather than being an oratorical event, oral arguments in the Court are more comparable to question-and-answer sessions.

Deciding a Case

Following the oral argument of a case, it is scheduled for discussion and decision on the merits in a private conference of the justices. Traditionally, the chief justice presides in the conference and discusses the case first, with the other justices following in order of seniority. Due to the press of the Court's caseload, the conference discussion is necessarily quite brief. By the time each justice has expressed his or her views, how the case will be decided will have become apparent, and a formal vote is usually unnecessary.

Writing Opinions

When voting with the majority in a case, the chief justice, by tradition, has the power to assign the writing of the majority opinion. If the chief justice is not in the majority, the senior associate justice in the majority then has the power to assign the opinion-writing for the majority.

The justice responsible for writing the majority opinion attempts to write an opinion with which the other justices in the majority agree. The majority opinion writer is frequently bombarded with memos from those colleagues seeking changes, additions, or deletions in the language and reasoning of the majority opinion. Those justices who agree with the result reached by the majority, but who disagree with the reasoning in the majority opinion or who desire to express their individual views while still voting with the majority, will write concurring opinions that express their own separate views. Those justices disagreeing with the result reached by the majority will write dissenting opinions.

The votes in conference by the justices on the merits of a case are frequently tentative. Powerful dissenting or concurring opinions may be sufficiently persuasive to change votes that had been cast in conference. The opinion-writing process is thus a continuation of the decision-making process. What starts out as a majority opinion may end up as a dissenting opinion, and vice versa.

In *Edwards* v. *Aguillard*, Justice Brennan succeeded in holding the majority of the Court to the views expressed in his opinion. His opinion, holding that the Louisiana Creationism Act violated the Establishment Clause of the First Amendment because it involved the advancement of religious doctrines in the public schools, was joined by Justices Marshall, Blackmun, Powell and Stevens. Justice Powell, however, wished to express individual views on the case, and he filed a concurring opinion which was joined by Justice O'Connor, while Justice White also filed a concurring opinion. Justice Scalia wrote a dissenting opinion, in which he was joined by Chief Justice Rehnquist, explaining why he felt the Louisiana

The Solicitor General

One litigant has a high rate of success in obtaining Supreme Court review of cases. That litigant is the U.S. Solicitor General of the Justice Department, who represents the federal government in cases before the Supreme Court. The Solicitor General's office is the only one in the country that argues exclusively before the Supreme Court.

The Solicitor General has the power to decide which of the large volume of cases involving the federal government that have been lost in the lower courts will be appealed to the Supreme Court. In making this decision, the Solicitor General is subjected to dual pressures—from the government agencies that want their cases to be finally decided by the Supreme Court and from the Court so as not to be flooded with government appeals. By carefully screening the cases the government appeals to the Court, the Solicitor General obtains credibility with the Court and is more likely to be granted a request for review of a government case than one coming from nongovernment litigants. And because the Solicitor General can refuse to appeal government cases that are not likely to be won, the Solicitor General also succeeds in winning more decisions on the merits in the Court than nongovernment litigants. The Solicitor General may intervene in nongovernment cases as amicus curiae and present the government's position on the issues involved in those cases, and, therefore, may be influential even in cases to which the federal government is not a party.

[3]At this stage, there will also be before the Court the record of the proceedings in the lower courts relevant to the issues before the Court; this record is called the Appendix.

Creationism Act was constitutional and the U.S. court of appeals' decision invalidating the act should have been reversed by the Court.

Announcing Opinions

Once all the opinions of the justices have been written, circulated, and printed in the Court's basement print shop, the decision of a case is ready to be announced by the Court. Until the 1960s, the Court traditionally announced its decisions on Mondays during its yearly term, but the announcement of numerous decisions on "decision Mondays" came to be perceived by the justices as overloading the news media and, therefore, reducing the effectiveness of the communication of the Court's decisions to the public. While the practice of always announcing decisions on Mondays was abandoned by the Court in the 1960s, the communication of the decisions of the Court remains a problem since the Court tends to announce large numbers of decisions as the end of its yearly term draws near. The digestion and effective communication of the decisions of the Court by the press and news media remains a subject of considerable concern for the media and for the Court itself.

Shaping the Law of the Land

The Struggle for Judicial Independence

The Constitution, as supplemented by the Judiciary Act of 1789, created the national judiciary deemed so necessary by many of the framers. Some people, however, believed that individual liberty as well as the powers of the states might be threatened by the new system of government. There was a widespread demand for a Bill of Rights to guard individual rights against encroachments by the federal government. To win ratification of the document in the state conventions, the supporters of the Constitution promised the attachment of a Bill of Rights.

The first Congress in 1789 proposed amendments comprising the Bill of Rights, which were ratified by the states in 1791. The Bill of Rights reflected the fear that the federal judiciary might prove inimical to individual liberties, because at least half of the rights regulated judicial procedures and limited the exercise of judicial power.

Under the Federalists

The initial performance of the federal judiciary, however, did not allay all suspicion. In one of its earliest important decisions, the Supreme Court held in *Chisholm v. Georgia* (1793) that the federal courts could hear suits against the states brought by citizens or even foreigners. The *Chisholm* decision thoroughly aroused those who feared the federal government would pose a threat to the powers of the states. The decision was reversed by the ratification in 1798 of the Eleventh Amendment, which barred the federal courts from hearing suits against the states brought by citizens of other states or subjects of foreign governments.

During the administrations of George Washington and John Adams, the Congress and the executive branch of the federal government were under solid control of the Federalist party. Washington and Adams were careful to appoint to the Supreme Court and the lower federal courts only those who shared the Federalist belief in a strong national government. The strength of the Federalist party was increasingly undermined by the growth of the Republican party led by Thomas Jefferson and James Madison. Leading Federalists came to fear that the Jeffersonian Republicans, if they obtained control of the government, would dismantle what the Federalists had accomplished, and indeed might prove to be subversive of the Constitution itself. These fears were reflected by the passage by Congress of the Sedition Act (1798), which prohibited individuals from criticizing the federal government or its officers in such a way as to discredit them in the eyes of the citizenry. The Sedition Act was denounced by the Jeffersonians as an obvious violation of the First Amendment's guarantees of freedom of speech and freedom of the press. The Jeffersonians called upon the federal courts, in which the Sedition Act was enforced, to declare it unconstitutional. Although no case testing the constitutionality of the Sedition Act ever reached the Supreme Court, some of the justices did pass upon the act's validity in their capacities as judges on the circuit courts, and all sustained the act as being constitutional. The Jeffersonians, who increasingly saw the federal courts as a partisan arm of the Federalist party, showed outright hostility toward the federal judiciary.

> "A more imposing judicial power was never constituted by any people."
>
> —Alexis de Tocqueville, *Democracy in America*

Thomas Jefferson won the presidential election of 1800 and carried with him majorities in both houses of Congress. Ousted from the executive and legislative branches of the federal government, the Federalists sought to reinforce their control over the judicial branch during the waning days of John Adams' presidency by enacting the Judiciary Act of 1801. In this act, the Federalists sought to deny Jefferson any early appointment to the Supreme Court by reducing the authorized number of justices on the Court from six to five.

The act of 1801 also abolished the requirement that Supreme Court justices must sit on the circuit courts, and instead created a new set of circuit judges who would henceforth preside over the U.S. circuit courts. President Adams quickly appointed loyal Federalists to these new judgeships and his appointments were confirmed by the lame duck Federalist-controlled Senate. A number of minor judicial posts were also created by Congress during this period, and Adams speedily filled them with deserving Federalists. The Jeffersonians charged that Adams was busy filling judgeships with Federalists until midnight of the day his term as president expired. Many of Adams' appointees were thus labeled "midnight judges" by the Jeffersonians.

For the Jeffersonians, the actions by the Adams administration and the Congress indicated that the Federalists, having been defeated in the battle for control of the presidency and Congress in 1800, were retiring into the judicial branch of government from which they could strike out at the policies of the incoming Jeffersonian administration.

Under Thomas Jefferson

Upon coming to power, the Jeffersonians sought to undo the Judiciary Act of 1801. Once in control of Congress, the Jeffersonians enacted the Judiciary Act of

1802. This essentially eliminated most of the changes effected by the Judiciary Act of 1801, restoring the federal judicial system to that under the Judiciary Act of 1789.

In an action viewed by many as an attempt to prevent the Supreme Court from passing on the constitutionality of its abolition of the circuit court judgeships, Congress failed to provide for a term of the Supreme Court. As a consequence, the Court could not convene for a period of over a year following its 1801 term. Further action against the Federalists holding lifetime federal judicial appointments was also threatened when leading Jeffersonians began to discuss impeachment as a method by which the judiciary could be made democratically responsible to the will of a majority of the people.

President Jefferson took additional action to reduce the grip of the Federalists upon the judiciary. Discovering that some of the commissions of appointment signed by President Adams for minor federal judicial offices remained undelivered by the Secretary of State's office, Jefferson ordered his Secretary of State, James Madison, not to deliver many of the commissions to the Federalists Adams had appointed. One such commission was to have gone to William Marbury, who had been appointed by Adams to the post of justice of the peace in the District of Columbia. Retaining counsel, William Marbury filed suit in the Supreme Court seeking a **writ of mandamus** from the Court requiring Madison to deliver the commission. Section 13 of the Judiciary Act of 1789 granted the Supreme Court the power to issue writs of mandamus directed at government officers in appropriate cases. The Court issued an order to Secretary of State Madison to show cause why a writ of mandamus should not be issued by the Court. The Court's action infuriated President Jefferson, who regarded the Court's order as further evidence that the Federalist-controlled Court was prepared to harass and embarrass his administration, especially now that the Court was led by Chief Justice John Marshall, regarded by Jefferson as a personal political enemy.

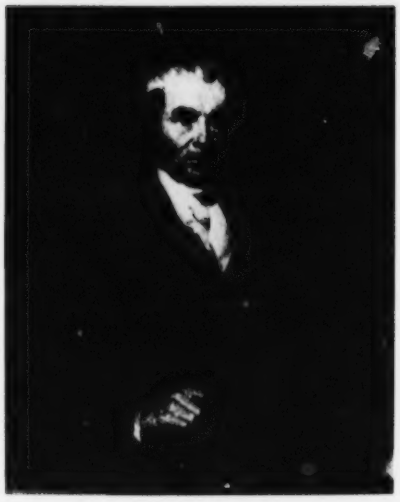
In addition to the legal and constitutional issues raised by *Marbury* v. *Madison*, the case posed serious political problems for the Supreme Court. If the Court were to rule in favor of Marbury, the Court's order would almost surely be ignored by the Jeffersonian administration. The Court's power and prestige would be dealt a serious blow. A ruling in Marbury's favor might also increase the danger of the removal of the members of the Court by impeachment, which continued to be a subject of discussion in Congress. On the other hand, if the Court ruled against Marbury because of its fear of the political pressure of the administration, its prestige would be seriously damaged in this instance as well.

Chief Justice Marshall devised a strategy that allowed the Court to avoid a direct confrontation with the Jefferson administration. In writing the Court's opinion in *Marbury* v. *Madison*, Marshall posed three questions requiring the Court's answer:

- *Was William Marbury legally entitled to the justice of the peace commission?*
- *Was a writ of mandamus the proper remedy to enforce Marbury's right to the commission if he were legally entitled to it?*
- *Could the Supreme Court lawfully and constitutionally issue the writ of mandamus in this case?*

The first two questions were answered affirmatively by Marshall. Marbury's appointment as justice of the peace in the District of Columbia had been made by President Adams, the Senate had confirmed it, the president had signed the commission of appointment, and the seal of the United States had been affixed to the commission. Thus Marbury was legally entitled to the commission of appointment. A writ of mandamus would not be issued by a court, Marshall acknowledged, to require a governmental official to perform a discretionary duty. But the duty of the Secretary of State to deliver commissions of appointment was not a discretionary one, it was merely a ministerial act required by law. The writ of mandamus was, Marshall concluded, the appropriate remedy by which a court could enforce Marbury's legal right to his commission of appointment.

Having in effect lectured the Jefferson administration on its unlawful behavior toward Marbury, Marshall then addressed the crucial question of whether the Court could lawfully and constitutionally issue a writ of mandamus. Here Marshall's answer was *no*. Marshall noted that the case of *Marbury* v. *Madison* had been filed in the Supreme Court under its original jurisdiction spelled out in Article III. But, Marshall noted, Article III did not mention that the Court would have the power to issue writs of mandamus. Yet Congress in section 13 of the Judiciary Act of 1789 had provided that the Court could issue writs of mandamus under its original jurisdiction. Marshall argued that it was a duty of the Court to enforce the supreme law of the land embodied in the Constitution and to invalidate an act of Congress that was in conflict with the Constitution. Since section 13 of the Judiciary Act of 1789 attempted to confer upon the Court a power that Article III of the Constitution denied to it, section 13 must be declared unconstitutional. The Court, therefore, could not issue the writ of mandamus sought by Marbury. A case that appeared to present the court with a serious political dilemma thus served in Marshall's hands as a vehicle for a bold assertion of the Supreme Court's power of judicial review.



Chief Justice John Marshall. Source: Collection of the Supreme Court of the United States

Despite the Supreme Court's decision in *Marbury* v. *Madison* in 1803, the power and independence of the federal judiciary continued to be endangered by the threat of the Jeffersonians to use the impeachment process. The Jeffersonians did in fact successfully impeach and remove from office a U.S. district court judge from New Hampshire in 1804. The Jeffersonians then turned to the Supreme Court itself, and articles of impeachment were voted against Justice Samuel Chase by the House of Representatives. In 1805, however, the Senate failed to muster the two-thirds majority required to remove Justice Chase from his position on the Supreme Court. The use of impeachment as a means of reining in the federal judiciary was then abandoned by the Jeffersonians. With the failure of the impeachment effort and with John Marshall's assertion of the power of judicial review in *Marbury* v. *Madison*, the Supreme Court and the federal judiciary emerged from the Jeffersonian crisis substantially strengthened in both their power and independence as the third branch of government.

The Marshall Court

John Marshall served as chief justice from 1801 until his death in 1835. Under John Marshall the Supreme Court found a continuity of leadership needed to shape the fundamental principles of American constitutional law.

Power of the Federal Government

During the era of the Marshall Court, some of the most enduring pronouncements in the field of constitutional law concerned the Court's liberal and expansive interpretation of the powers of the federal government under the Constitution. The Court held in *McCulloch* v. *Maryland* (1819), in an opinion written by John Marshall, that Congress possessed not only those powers specifically delegated to it under Article I of the Constitution but also a broad power to choose the means by which its delegated powers could be brought into execution.

The issue in *McCulloch* v. *Maryland* was whether Congress could constitutionally create a Bank of the United States. That issue had divided President Washington's cabinet. Secretary of State Thomas Jefferson argued that since Article I of the Constitution did not mention a power to create a bank as being among the powers of Congress, Congress could not validly charter a bank. Secretary of the Treasury Alexander Hamilton, however, argued that Congress could adopt those means necessary and proper to the execution of its other delegated powers. Chief Justice Marshall held for the Court that Hamilton's views were correct.

Maryland's attempt to tax the banknotes issued by the Baltimore branch of the Bank of the United States, which was at issue in the *McCulloch* case, was declared unconstitutional by Marshall. Marshall argued that the bank was a proper means of carrying into execution the fiscal powers of Congress, and if the states could tax the legitimately created agencies of the national government, they would possess the power to destroy those agencies. Marshall's expansive interpretation of national power in *McCulloch* v. *Maryland* ultimately became the accepted constitutional interpretation.

Free Trade and Commerce

One of the principal economic goals of the framers of the Constitution had been the elimination of the barriers to free trade and commerce among the states that were increasingly being erected by state legislatures during the Articles of Confederation period. In order to accomplish this, the Constitution granted to Congress the power to regulate interstate and foreign commerce (the Commerce Clause), removing that power from the hands of the states. The Commerce Clause of the Constitution accomplished for the United States in 1789 what the European nations only began to accomplish in the 1950s—a common market free of state-erected barriers to free trade.

This accomplishment was nevertheless threatened during the 1820s when the states began to grant monopolies to favored companies within their boundaries. The most notorious of these monoplies existed in New York. Anyone seeking to engage in steamboat operations in New York was required to secure a license from the steamboat transportation monopoly. In *Gibbons* v. *Ogden* (1824), the New York steamboat monopoly was challenged in the Supreme Court.

Arguing on behalf of Gibbons, Daniel Webster urged the Court to construe the Commerce Clause as having delegated to Congress the *exclusive* power to regulate interstate and foreign commerce and to hold that any state regulation of commerce, such as that involved in the New York monopoly, was, therefore, forbidden by the Constitution. Defending the New York monopoly, other counsel argued that the states possessed a concurrent power to regulate interstate and foreign commerce. And it was argued that commerce did not in any case embrace navigation, that congressional power under the Commerce Clause was rather narrow.

Writing for the Court in *Gibbons* v. *Ogden*, Marshall held that commerce within the meaning of the Commerce Clause embraced all manner of commercial intercourse, including navigation, and that the congressional power under the Commerce Clause reached not only commercial intercourse involving the crossing of state boundaries but also any commercial activities within the states that affected other states. And the scope of the congressional power to regulate interstate and foreign commerce was equally broad, Marshall declared, since it included the power to prescribe the rules by which commerce was to be governed.

Addressing the question of whether this very broad congressional commerce power was exclusively vested in Congress, as Webster had urged, leaving the states completely bereft of any regulatory power over interstate and foreign commerce, Marshall also indicated that if the Court were forced to choose, it would decide in favor of the exclusiveness of congressional power. Such a choice was unnecessary, Marshall held, since Gibbons had acquired a license to engage in the coasting trade (the seaborne trade among the Atlantic coast ports) under an act of Congress regulating that trade. By excluding Gibbons' steamboats from New York waters through its steamboat monopoly, Marshall held, New York had enacted a regulation of commerce in direct conflict with an act of Congress. And since the Supremacy Clause of the Constitution declared the Constitution, federal laws, and treaties to be the supreme law of the land, a state law in conflict with a validly enacted act of Congress must be invalidated by the Court. With the demise of the New York steamboat monopoly, a major threat to the freedom of interstate and foreign commerce was removed.

In *Gibbons* v. *Ogden*, Marshall laid down what is the modern definition of the scope of congressional power under the Commerce Clause. Even though the Court backed away from Marshall's interpretation of the commerce power from the 1890s to 1937, it returned to Marshall's interpretation and continues to follow essentially that construction today.

On the other hand, regarding the issue of whether the power of Congress over interstate and foreign commerce is exclusive and completely ousts the states from the field, Marshall's position in *Gibbons* v. *Ogden* has not been followed. The Court subsequently adopted the position of "selective exclusiveness," holding that areas of commerce not requiring uniform national regulation may be regulated by the states until such time when the Congress supplants the state regulations with national legislation.

Slavery and Civil War Issues

John Marshall left a legacy of nationalistic constitutional principles, as well as a stout defense of property rights, upon which his successors would build. Marshall's immediate successor was Roger B. Taney of Maryland, who served as chief justice from 1836 to 1864. While there was no abrupt break by the Taney Court with the legacy of the Marshall Court, Chief Justice Taney and his Court were confronted more directly than their predecessors with the fundamentally divisive issue of slavery. However unfairly, the Taney Court is most remembered for the disastrous decision in *Dred Scott* v. *Sandford* (1857).

Dred Scott

The first major national confrontation over the slavery issue had occurred in 1820 and concerned the issue of whether slavery would be allowed to expand into the western territories. In the Missouri Compromise in 1820, Congress decreed that the western territories should be divided into northern and southern sections, with slavery allowed in the southern section and banned in the northern section. After Dred Scott had been taken by his owner into the northern territories before his return to

Missouri, Scott filed suit in the federal courts seeking his freedom, arguing that his sojourn in the territory north of the Missouri Compromise line should result in his emancipation.

Scott invoked the **diversity of citizenship jurisdiction** of the federal courts—the jurisdiction that allows them to entertain suits by citizens of different states. Therefore, the first question addressed by Chief Justice Taney in the *Dred Scott* case was whether Scott was a citizen of Missouri. If he were not, no diversity of citizenship existed in Scott's case, and the federal courts were without jurisdiction to hear and decide his case. After examining the status of blacks at the time the Republic was formed, Taney concluded that blacks had never been considered eligible for citizenship.

The Court could properly have dismissed the *Dred Scott* case at this point for lack of jurisdiction. Chief Justice Taney and a majority of the Court nevertheless resolved to decide the fundamental underlying issue in the case—whether Congress could constitutionally proscribe the extension of slavery into the territories. Under the Constitution, Taney held, slaves were recognized as a legitimate form of property. The property rights slave owners had in their slaves were protected by the Due Process Clause of the Fifth Amendment. The attempt by Congress in the Missouri Compromise to prohibit the extension of slavery into some of the territories deprived slave owners of a constitutionally recognized form of property without due process of law. Therefore, congressional attempts to forbid the extension of slavery into the territories were unconstitutional.

News of the Dred Scott *decision. Source:* Harper's Weekly, *from Library of Congress*

Military Trials

Among the constitutional issues raised by the conduct of the Civil War that followed in the *Dred Scott* decision's wake, none raised more serious concerns for the maintenance of American liberty than the trial of civilians by military tribunals. Sitting as a circuit court justice, Chief Justice Taney held in ***Ex parte Merryman*** (1861) that it was unconstitutional for President Abraham Lincoln to suspend the writ of **habeas corpus** and ordered Merryman to be freed by the military authorities holding him in custody. The Lincoln administration ignored Taney's order, however, and the arrest and trial of civilians by the military under the authority of both the president and Congress continued throughout the Civil War.

After the war, the Supreme Court nevertheless held in *Ex parte Milligan* (1866) that civilians could not be constitutionally arrested and tried by military tribunals when they were outside an active theater of combat operations and where the civil courts were open and functioning. Since reconstruction rested in part upon the trial of civilians in the South by military tribunals, the *Milligan* ruling drew into question the constitutional validity of military reconstruction following the Civil War.

William McCardle was a Mississippi newspaper editor who was arrested by the military for seditious activity because of his vituperative editorial denunciations of reconstruction and the Union military authorities enforcing it. He was tried and sentenced by a military commission, although there was no longer any active combat in Mississippi and the civil courts were open and functioning. McCardle eventually appealed his case to the Supreme Court under the Habeas Corpus Act of 1867, which authorized the federal courts to release from custody any person being held in violation of the Constitution, laws, or treaties of the United States. Since McCardle's trial and sentencing by a military tribunal appeared to violate the principles enunciated by the Court in *Ex parte Milligan*, it seemed probable that the Court would hold his trial and sentencing by a military tribunal unconstitutional and order his release.

Congress was unwilling to see its reconstruction policy thwarted by the Court. It passed an act repealing the Court's jurisdiction to hear appeals from the lower federal courts under the Habeas Corpus Act of 1867. This was undoubtedly the most serious direct blow to the independence of the Supreme Court since the Chase impeachment in 1805. But the Court, bowing to the power of Congress under Article III of the Constitution to make rules and exceptions to its appellate jurisdiction, dismissed the *McCardle* case in 1869 for lack of jurisdiction. And the validity of reconstruction policy in the South was avoided by the Court.

Civil War Amendments

The reconstruction period, despite the damaging effect of the *McCardle* episode on the Court, was an era of rapid expansion of the power of the federal judiciary. Congress significantly enlarged the jurisdiction of the federal courts. The Civil War amendments to the Constitution—the Thirteenth (1865), Fourteenth (1868), and Fifteenth amendments (1870)—also expanded the reach of federal judicial power. The Thirteenth Amendment abolished slavery, and the Fifteenth Amendment prohibited the denial of the right to vote on the grounds of race, color, or previous condition of servitude.

The Fourteenth Amendment provided that all persons born or naturalized in the United States and subject to its jurisdiction were citizens of the United States. The

Tornado (1935). Source: Temple University Collection

Fourteenth Amendment thereby conferred automatic citizenship upon the newly freed blacks and reversed the Supreme Court's holding in the *Dred Scott* case. The amendment also placed new restrictions on the powers of the states which had an even greater significance for the future. The states were forbidden to deny any person within their jurisdiction the equal protection of the laws (the Equal Protection Clause) or to deprive any person of life, liberty, or property without due process of law (the Due Process Clause).

Denials to Blacks

During the immediate post-Civil War period, the Court sought to moderate the changes in the system brought on by the war and the Civil War amendments to the Constitution. The immediate effect of the Court's policy was to deny to the newly freed blacks the full measure of freedom and equality that the Civil War amendments had appeared to ensure them. In the *Civil Rights Cases* (1883), the Court held that Congress lacked the power to prohibit racial discrimination in facilities of public accommodation, such as theaters, hotels, and restaurants. Congressional power to enforce the Equal Protection Clause of the Fourteenth Amendment, the Court held, was limited to proscribing any state from denying the equal protection of the laws. Discrimination by private individuals, as distinguished from the states, in facilities of public accommodation they owned was, therefore, beyond the reach of the Fourteenth Amendment.

The Court struck an even heavier blow to the idea of black equality when it upheld a Louisiana statute requiring separate railroad cars for blacks and whites. In sustaining the Louisiana law in *Plessy* v. *Ferguson* (1896), the Court held that the Equal Protection Clause of the Fourteenth Amendment did not prohibit the states from requiring separate but equal facilities for blacks and whites. Under this separate but equal doctrine, the southern and some northern states evolved a legally required system of rigid racial segregation that applied not only to railroad cars but also to education facilities, public accommodations, and most other aspects of daily life.

The Court and Economic Affairs

In one of the ironies of American constitutional development, the Supreme Court was narrowly construing the protections afforded to blacks under the Constitution while expanding the protections regarding property rights afforded to business enterprises.

Restricting Regulation of Business

In 1886 the Court held that business corporations were "persons" within the meaning of the Fourteenth Amendment whose liberty and property could not be denied by the states without due process of law. This ruling allowed business corporations to attack state regulatory legislation under the Fourteenth Amendment's Due Process Clause. Soon after, the Court held that the Due Process Clause prohibited unreasonable attempts by state legislatures to regulate or interfere with the property rights of business enterprises. Also, during the 1890s, the Court adopted an interpretation of congressional power that Congress generally could not regulate production and manufacturing enterprises under the Commerce Clause. This ruling was much narrower than that advocated by Chief Justice Marshall in *Gibbons* v. *Ogden*. And in a decision that epitomized the Court's strong emphasis on the protection of property rights under the Constitution, the Court, in the *Income Tax Case* (1895), declared the congressional attempt to impose an income tax unconstitutional. Only through the adoption of the Sixteenth Amendment to the Constitution, ratified in 1913, was the power to levy income taxes restored to Congress.

The Supreme Court continued to rein in governmental power over economic affairs after the turn of the century. In 1918 and again in 1922, the Court held that Congress could not use either its commerce power or its taxing power to regulate or prohibit child labor. The use of child labor in production or manufacturing enterprises, it held, was a subject matter reserved to the states for regulation if it was to be regulated at all, and was, therefore, beyond the scope of congressional power. Neither the federal government nor the states, the Court additionally held, could regulate minimum wages for workers, since minimum wage regulations deprived employers of their liberty and property without due process of law.

The Court and the New Deal

The stock market crash in 1929 and the onset of the Depression ignited demands that the powers of the national government be employed to heal a ravaged economy. It became increasingly clear that the Supreme Court's attempts since the 1890s to restrict governmental interferences with the economic system would be subjected to serious challenge. That challenge appeared with the inauguration of President Franklin Roosevelt. He soon initiated the New Deal which involved national legislation based upon bold uses of national power under the Constitution. In the National Industrial Recovery Act (NIRA) of 1933, Congress sought through its commerce power to control the overproduction of manufactured goods and to impose upon industry regulations that established maximum hours, minimum wages, and child labor restrictions, as well as a guarantee of the right of workers to organize into unions. And in the Agricultural Adjustment Act (AAA) of 1933, Congress exercised its taxing and spending powers to pay farmers to reduce their production of basic agricultural commodities with the goal of raising the prices farmers received.

The NIRA and the AAA were twin pillars of the New Deal's attempt to cope with the effects of the Depression. Both conflicted with what the Supreme Court believed the proper scope of national power should be. In *Schechter Poultry Corp.* v. *United States* (1935), popularly known as the Sick Chicken Case, the Court declared the NIRA was beyond the scope of congressional power under the Commerce Clause and, therefore, was unconstitutional. Under the NIRA, the Court held, Congress was attempting to reach and regulate industrial activities having only indirect effects upon interstate commerce. Similarly, in *United States* v. *Butler* (1936), the Court invalidated the AAA. While the power to spend money was an independent grant of power to Congress, that power could not be used to regulate agricultural production which was a subject matter reserved to the states under the Constitution. In *Morehead v. New York* (1936), the Court by a narrow five to four vote once again held that minimum wage legislation was unconstitutional.

Despite the Supreme Court's invalidation of the heart of his New Deal programs, Franklin Roosevelt was overwhelmingly re-elected in 1936 and, early in 1937, he proposed legislation to eliminate the Court as a roadblock to the New Deal by increasing the number of justices on the Court from nine to fifteen. In the face of FDR's court-packing proposal, however, the Court was soon to reverse its course on matters of constitutional interpretation. It upheld minimum wages in *West Coast Hotel Co.* v. *Parrish* (1937) by a five to four vote. Justice Owen Roberts had been in the majority that had invalidated minimum wages in the *Morehead* case, yet he voted with the majority to uphold minimum wages in the *Parrish* case in 1937. Roberts' behavior regarding the minimum wage issue was soon being humorously referred to as "the switch in time that saved nine." Roberts' switch on the minimum wage issue was widely considered to have been induced by Roosevelt's court-packing proposal. This was untrue because Roberts cast his vote to uphold minimum wages in the *Parrish* case before FDR publicly announced the court-packing plan.

Of even greater importance, however, was the Court's change in its view in the spring of 1937 of the proper scope of national power over economic affairs. In *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.* (1937), the Court upheld the application of the National Labor Relations Act of 1935, which was based on the Commerce Clause, to labor relations in manufacturing and production enterprises. And in the *Social Security Act Cases* (1937), the Court upheld broad uses of congressional power to tax and spend to support far-reaching social programs.

The Court's decisions in the *Jones & Laughlin* case and the *Social Security Act Cases* marked the beginning of its abandonment of its role as censor of socioeconomic policies enacted by the elected branches of the government. After 1937, the Court adopted a policy of judicial self-restraint which allowed the greatest possible leeway to the elected branches of government, both national and state, as far as the formulation of socioeconomic policy was concerned. Despite this shift in its role, the Court soon began to play a more active role in the protection of civil liberties and civil rights.

The Court and Civil Rights

Regarding Racial Equality

After the 1940s, the Court began to invigorate the constitutional right of equality.

The New York Times.

LATE CITY EDITION

HIGH COURT BANS SCHOOL SEGREGATION; 9-TO-0 DECISION GRANTS TIME TO COMPLY

McCarthy Hearing Off a Week as Eisenhower Bars Report

SENATOR IS IRATE Communist Arms Unloaded in Guatemala By Vessel From Polish Port, U. S. Learns

REACTION OF SOUTH

1896 RULING UPHELD

President Orders Aides Not to Disclose Details of Top-Level Meeting

Breathing Spell for Adjustment Tempers Region's Feelings

Separate but Equal Doctrine Held Out of Place in Education

SOVIET BIDS VIENNA CEASE INTRIGUES

City Colleges' Board Can't Pick Chairman

2 TAX PROJECTS DIE IN ESTIMATE BOARD

Source: Library of Congress

The white primary, which had prevented blacks from voting in the primary elections of the Democratic party in the South, was declared unconstitutional by the Court as a violation of the Fifteenth Amendment. The decision in the *White Primary* case was the first step in a chain of events culminating in the passage by Congress of the Voting Rights Act of 1965, which eliminated discriminatory devices against voting by blacks. The act opened the political process to full black participation in the South for the first time since Reconstruction.

During the 1940s and 1950s, the Court also began to enforce with new vigor the separate but equal doctrine enunciated in the *Plessy* case in 1896. While the southern and border states had instituted pervasive racial segregation under the separate but equal doctrine, those states had frequently neglected to furnish equal facilities to blacks. For example, no professional schools were available to blacks in state universities in many states while such schools were provided for whites. Such conditions, the Court held repeatedly during the 1940s and 1950s, violated the Equal Protection Clause of the Fourteenth Amendment, even under the lenient standard of separate but equal recognized in the *Plessy* case.

Encouraged by its success in desegregating professional education, the National Association for the Advancement of Colored People (NAACP), led by its general counsel, Thurgood Marshall, concluded in the early 1950s that the time had come to directly challenge the separate but equal doctrine in the field of public education. The Association developed several cases challenging racial segregation in the public schools. *Brown* v. *Board of Education of Topeka, Kansas,* (1954), and its companion cases were first argued before the Supreme Court presided over by Chief Justice Fred Vinson. But due to Chief Justice Vinson's death while the cases were pending, as well as the inherent importance of the cases, the Court heard reargruments in the cases following the appointment of Vinson's successor, Chief Justice Earl Warren. The Court was initially divided over whether to overrule *Plessy* v. *Ferguson* and the separate but equal doctrine. Under Chief Justice Warren's leadership, however, a unanimous Court announced in *Brown* v. *Board of Education* that separate public schools for blacks were inherently unequal and that the doctrine of separate but equal no longer had a place in American public education. Recognizing the momentous social changes required by its decision, the Court held in 1955 that desegregation of the public schools should proceed with "all deliberate speed." Until the president and Congress came to the Court's aid in enforcing desegregation with the civil rights legislation of the 1960s, however, desegregation as required by the *Brown* decision proceeded slowly.

The new commitment to the equality symbolized by the Supreme Court's *Brown* decision was not confined to the field of public education, as the Court held during the 1950s and 1960s that governmentally enforced racial segregation in all walks of life was invalid.

Extending Equality

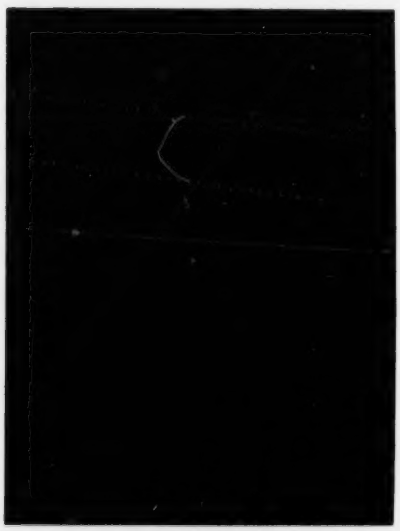
The principle of egalitarianism was also expanded beyond racial discrimination to fields such as legislative apportionment and congressional districting. The Court initiated the "reapportionment revolution" in the 1960s by ruling that state legislative and congressional districts must be based on the concept of "one person, one vote" under the Equal Protection Clause and Article I of

the Constitution. In the early 1970s, the Court for the first time held that sexual discrimination was also barred by the Equal Protection Clause. The Court then began its contemporary struggle to define the standards by which it could judge sexual discrimination cases, as well as cases raising questions concerning affirmative action programs which sought to remedy past discrimination against women, blacks, and other minority groups.

Nationalization of the Bill of Rights

Beyond Marshall's Interpretation. Chief Justice John Marshall had held that the rights in the Bill of Rights applied only to the national government in *Barron* v. *Baltimore* (1833). By the 1940s Marshall's ruling in this regard had clearly been modified by the Court through its interpretation of the Fourteenth Amendment Due Process Clause. In 1897, for example, the Court held that the states must furnish just compensation for private property taken for public purposes, a right that had always been applicable to the national government under the Fifth Amendment of the Bill of Rights.

The Court's use of the Fourteenth Amendment's Due Process Clause to apply rights in the Bill of Rights to the states increased during the 1920s, when it held in *Gitlow* v. *New York* (1925) that it assumed that freedom of speech and freedom of the press, protected from invasion by the federal government by the First Amendment, were also protected against state interference by the word "liberty" in the Due Process Clause. And during the 1930s, the Court confirmed that not only were freedom of speech and freedom of the press protected from state interference, but that freedom of assembly was also protected by the Due Process Clause. By 1947, all of the rights in the First Amendment of the Bill of Rights were considered to be applicable to both the states as well as the national government. This process of interpreting the Fourteenth Amendment is usually called "the nationalization of the Bill of Rights."



Chief Justice Earl Warren. Source: Collection of the Supreme Court of the United States

The nationalization of the Bill of Rights through the Due Process Clause of the Fourteenth Amendment laid the basis for some of the Court's most important as well as controversial decisions of the 1950s, 1960s, and 1970s. The Court ruled in the 1960s, for example, that state-sponsored prayers in the public schools were unconstitutional because of the First Amendment's requirement of separation of church and state which, although originally applicable only to the federal government, was by the 1940s considered to be equally applicable to the states under the Fourteenth Amendment.

The Warren Court. The nationalization of the Bill of Rights was accelerated by the Warren Court, and during the the 1960s the Court applied almost all of the criminal procedure restrictions in the Bill of Rights as restrictions upon the states, also via the Fourteenth Amendment. In a decision that continues to arouse controversy, the Court ruled in *Mapp* v. *Ohio* (1961) that the Fourth Amendment's prohibition of unreasonable searches and seizures applied to the states, as well as the rule that prohibits the use in criminal trials of evidence seized by the police in violation of the Fourth Amendment. In 1962, the Court additionally held that the Eighth Amendment's prohibition of cruel and unusual punishment applied to the states. In 1963 and 1964, it held that the right of a criminal defendant to the assistance of counsel, required by the Sixth Amendment, and the right to be free from compulsory self-incrimination, as guaranteed by the Fifth Amendment, applied to the states. These decisions formed the basis of another controversial decision, *Miranda v. Arizona* (1966), in which the Court held that criminal suspects must be warned by the police of their rights to counsel and to silence under the Self-incrimination Clause prior to any interrogation. Any confession or incriminating statement elicited in the absence of these warnings, the Court held, should be excluded from criminal trials.

The Court also held that the Sixth Amendment's guarantees of the right of a criminal defendant to confront and cross-examine the prosecution witnesses, to subpoena favorable witnesses, and to a speedy and public trial by a jury were applicable to state criminal trials as well as to trials in the federal courts. In 1969 the Court also ruled that the Fifth Amendment's prohibition of double jeopardy applied in the conduct of state criminal trials.

By 1969 the Court had held that almost all of the Bill of Rights were now equally applicable to the states through the Due Process Clause of the Fourteenth Amendment. Only the Second and Third Amendments, the requirement of an indictment by grand jury of the Fifth Amendment, the right to jury trials in civil cases under the Seventh Amendment, and the excessive fines and bail prohibition of the Eighth Amendment of the Bill of Rights remained inapplicable to the states through the Fourteenth Amendment. The Court had converted the Due Process Clause of the Fourteenth Amendment into a second bill of rights, a bill of rights more salient to the average person than the original Bill of Rights had once been.

Additional Rights. The Due Process Clause, the court had also held, was not limited to guaranteeing most of the rights in the Bill of Rights against interference by the states, but it additionally protected rights which were not necessarily recognized specifically in the Constitution. In *Griswold* v. *Connecticut* (1965), the Court held that the Due Process Clause protected the right of privacy and invalidated a Connecticut law prohibiting the use of contraceptives as an unreasonable interference with the right of privacy. In 1973 the right to privacy recognized in the *Griswold* case became the basis for one of the most controversial contemporary decisions of the Court when it held in *Roe* v. *Wade* that the right to privacy embraced the right of a woman to obtain an abortion.

The Court's abortion decision ignited a battle between "pro-life" and "pro-choice" groups that remains unabated. Controversy over whether a right of privacy legitimately exists under the Constitution played an important role during Senate hearings on President Reagan's nomination of Judge Robert Bork to the Supreme Court in 1987. The national debate regarding whether the Court should be "activist" or "restraintist" in the field of civil rights and liberties, which first surfaced in the 1940s, continued to be debated as President Reagan witnessed the defeat not only of Judge Bork in the Senate, but also the withdrawal under fire of his subsequent choice for the Court, Judge Douglas Ginsburg. In the 1980s, as in its earlier years, the Supreme Court remains as Justice Oliver Wendell Holmes described it. "We are very quiet there, but it is the quiet of a storm centre, as we all know."

Profiles of the Justices

William Hubbs Rehnquist, born October 1, 1924, in Milwaukee, Wisconsin. Education: Stanford University, B.A., Phi Beta Kappa, 1948; M.A., 1948; Harvard University, M.A. in political science, 1950; Stanford University Law School, LL.B., 1952. Religion: Lutheran.

After law school, he served as a law clerk to Supreme Court Justice Robert H. Jackson. He practiced law in Phoenix before becoming immersed in Republican politics. He served as an assistant attorney general under Richard Nixon who appointed him to the Court in 1971. Ronald Reagan named him chief justice in 1986. He has been the Court's most consistently conservative member.

William Joseph Brennan, Jr., born April 25, 1906, in Newark, New Jersey. Education: University of Pennsylvania, B.S., 1928; Harvard Law School, LL.B., 1931. Religion: Roman Catholic.

He served as a judge at various levels of the New Jersey state court system before being nominated to the Supreme Court by Dwight Eisenhower in 1957. He spoke for the Warren Court on some of the major issues of the 1960s, including the landmark reapportionment case of *Baker* v. *Carr* (1962). He has been a staunchly liberal voice in the Court.

Byron Raymond White, born June 8, 1917, in Fort Collins, Colorado. Education: University of Colorado, B.A., Phi Beta Kappa, 1938; Rhodes Scholar, Oxford University, 1939; Yale Law School, LL.B., magna cum laude, 1946. Religion: Episcopal.

Before becoming a lawyer, he played professional football. After law school he served as law clerk to Chief Justice Fred M. Vinson, then practiced law in Denver for 14 years. He worked for the election of John F. Kennedy who later named him deputy attorney general. Kennedy nominated him to the Supreme Court in 1962. On the Court he is known as a strict constructionist because of his literal approach to legal issues.

Thurgood Marshall, born July 2, 1908, in Baltimore, Maryland. Education: Lincoln University, A.B., cum laude, 1930; Harvard University Law School, LL.B., 1933. Religion: Episcopal.

During three decades as civil rights attorney for the National Association for the Advancement of Colored People (NAACP), he coordinated that organization's attack on segregation in voting, housing, public accommodations and education. As chief counsel in the *Brown* v. *Board of Education* case, he argued before the Supreme Court. He has served as a U.S. court of appeals judge and the nation's first black solicitor general. Lyndon Johnson nominated him to the Supreme Court in 1967. He is the first black to serve on the Court, where he has compiled a consistently liberal record.

Harry Andrew Blackmun, born November 12, 1908, in Nashville, Illinois. Education: Harvard University, B.A., Phi Beta Kappa, 1929; Harvard Law School, LL.B., 1932. Religion: Methodist.

He spent his early years in Minneapolis-St. Paul where he began a lifelong friendship with former Chief Justice Warren Burger. After law school he served as law clerk to a U.S. circuit court judge, then joined a Minneapolis law firm. For nine years he was resident legal counsel for the world famous Mayo Clinic in Rochester, Minnesota. President Eisenhower appointed him a U.S. circuit judge in 1959, and in 1970 Richard Nixon nominated him to the Supreme Court. A liberal spokesman on the Court, he wrote the opinion in the 1973 landmark abortion case, *Roe* v. *Wade*.

John Paul Stevens, born April 20, 1920, in Chicago, Illinois. Education: University of Chicago, B.A., Phi Beta Kappa, 1941; Northwestern University School of Law, J.D., 1947. Religion: Baptist.

After law school he served as a law clerk to Supreme Court Justice Wiley B. Rutledge. He later developed a reputation as a pre-eminent antitrust lawyer. He was nominated to the Supreme Court by Gerald Ford in 1975. On the ideological spectrum he is a centrist. Even though his conclusions may be the same as those of his colleagues on the Court, he often files separate opinions that challenge old assumptions.

Sandra Day O'Connor, born March 26, 1930, in El Paso, Texas. Education: Stanford University, B.A., magna cum laude, 1950; Stanford University Law School, LL.B., high honors, 1952. Religion: Episcopal.

After working as a civilian attorney for the Army, she decided to curtail her legal career for a time to stay at home with her children. Soon after resuming her career she became involved in Arizona politics and was elected to the state senate. She was active in the Republican party, working to reelect Richard Nixon. She served on the Arizona Court of Appeals before Ronald Reagan nominated her to the Supreme Court in 1981. She holds strong, generally conservative views.

Antonin Scalia, born March 11, 1936, in Trenton, New Jersey. Education: Georgetown University, B.A., summa cum laude, 1957; Harvard Law School, LL.B., 1960. Religion: Roman Catholic.

After working for a prestigious law firm, he turned down a lucrative corporate law partnership for the intellectual challenge of academic law and the lure of politics. He taught at the University of Virginia Law School, then held positions in both the Nixon and Ford administrations. He returned to academia, teaching at the University of Chicago Law School. In 1982 he became a U.S. Court of Appeals judge, and in 1986 Ronald Reagan nominated him to the Supreme Court. An outspoken advocate of judicial restraint, he is expected to play a key role in moving the Court to the political right.

Anthony McLeod Kennedy, born July 23, 1936, in Sacramento, California. Education: Stanford University, A.B., 1958; London School of Economics; Harvard Law School, LL.B., 1961. Religion: Roman Catholic.

His practice of law began at a prominent San Francisco law firm, but he left to take over his father's law practice after his father died. In 1965 he began teaching constitutional law, his strongest legal interest. Gerald Ford appointed him to the U.S. Court of Appeals in 1975. In 1987 Ronald Reagan nominated him to the Supreme Court. His lower court rulings are generally cited as evidence of his conservative views.

Lewis Franklin Powell, Jr., born September 19, 1907, in Suffolk, Virginia. Education: Washington and Lee University, B.S., Phi Beta Kappa, 1929; Washington and Lee University Law School, LL.B., 1931; Harvard Law School, LL.M., 1932. Religion: Presbyterian.

After law school he joined a prestigious Richmond law firm, where he advised both state and national corporations and was extensively engaged in litigation. He was deeply involved in the sensitive question of desegregating the public schools of Virginia. Richard Nixon nominated him to the Supreme Court in 1971. On the Court he reflected moderate views on most issues. He resigned from the Court in 1987.

Program One

A History of the Court

Objectives

- to examine the role of the Supreme Court in shaping U.S. history
- to understand how Supreme Court decisions affect the everyday lives of ordinary citizens
- to analyze the effects of political and societal influences on the Supreme Court

Synopsis

This program surveys the Court's evolution and growth from its original circuit-riding days to modern times. As host Paul Duke describes the Court's early history, engravings and prints of New York, Philadelphia, and Washington in the late eighteenth and early nineteenth centuries show the Supreme Court's very modest beginnings. Historians discuss John Marshall's view of the Constitution and point out the significance of the major Supreme Court decisions under Marshall, primarily the strengthening of the federal government relative to the states.

The program next focuses on the Court under Roger Taney, when the issue of slavery flared up and came to a head in the infamous *Dred Scott* decision. The decision divided the country and weakened the Supreme Court, hastening the Civil War.

Scenes of postwar economic expansion give way to pictures of overcrowded cities and children working in factories. The Supreme Court during this period was a staunch supporter of business interests over the rights of individuals affected by the excesses of free-wheeling business. The probusiness leaning of the Court persisted into the New Deal era.

Historian William Leuchtenburg recalls the confrontation the Court provoked when it ruled against major New Deal legislation as being unconstitutional. Joseph Rauh, law clerk for Benjamin Cardozo, tells of Franklin Roosevelt's plan to pack the Supreme Court, a blatant attempt to appoint justices who would rule favorably on New Deal legislation.

The program then turns to the tenure of Earl Warren, when the Court became more and more involved in questions of civil rights and personal freedom. Judge Abner Mikva, law clerk to Justice Sherman Minton, relates the behind-the-scenes conversations about the school desegregation cases being considered at the time. News footage of riot police and students in Little Rock, Arkansas, captures the mood of the period following the 1954 decision outlawing school segregation.

Paul Duke points out that some of the most controversial rulings of the Warren Court were in the area of criminal procedure, leading Richard Nixon to criticize the Court in his 1968 presidential campaign and call for a return to "law and order." His appointment of Warren Burger as chief justice was the fulfillment of a campaign promise to appoint to the Court conservatives who would stem the liberal tide.

The final section of the program deals with the process of nominating and confirming Supreme Court justices. Recent footage shows the political fight over Robert Bork, who was nominated by Ronald Reagan. Laurence Tribe describes the episode as a national debate on the meaning of the Constitution, particularly fitting during the bicentennial year of the Constitution.

Previewing Activities

1. Have students read Article III of the U.S. Constitution on the establishment of the judicial branch of government. Discuss the difference between original jurisdiction and appellate jurisdiction set forth in section 2 paragraph 3. (See Glossary.) Explain that the Court's powers, listed in section 2 paragraph 1, were affected by the Eleventh Amendment.
2. Give students copies of the chart "Chief Justices of the United States" contained in this guide. Reading the chart will provide a quick overview of the various directions of the Court throughout our nation's history.
3. Have the students read Alexis de Tocqueville's *Democracy in America*, volume 1, chapter 6, "Judicial Power in the United States and Its Effect on Political Society," and chapter 8, the sections on the federal courts.
4. For historical background have students read *The Federalist Papers*, Nos. 78-83 on the judiciary branch of the government, No. 51 on the separation of powers, and No. 10 on the control of factions in a federal government.
5. ***Focus Question.*** (This question should be put to the students to provide a framework for viewing, with discussion taking place after viewing.) How is the Supreme Court a timeless institution, and in what ways is it a creature of its time?

Postviewing Discussion

1. What is meant by the "fluid Constitution"? What do we mean when we say the Constitution is a living document? How does the Supreme Court keep the Constitution alive?
2. Which Supreme Court decision was more important for the survival of the country: *Marbury* v. *Madison* which established judicial review or *McCulloch* v. *Maryland* which favored federal supremacy? Why?
3. What is the importance of original intent in interpreting constitutional provisions? How do the justices deal with the notion of original intent when they decide constitutional questions?
4. Throughout the history of our country, Supreme Court decisions have had dramatic effects on the course of events. From where does the Court derive its power to influence the conduct of affairs?
5. Without the Supreme Court's *Dred Scott* decision, would the Civil War have occurred? If the decision had come down in favor of Dred Scott, would there still have been a Civil War?
6. How did the *Dred Scott* decision weaken the Court?
7. How do you explain the fact that in the late nineteenth century the Supreme Court based many of its probusiness decisions on

the Due Process and Equal Protection provisions of the Fourteenth Amendment and then, in the mid-twentieth century, based decisions favoring individual civil rights on the same provisions? Wasn't the Court contradicting itself?

8. Do you agree with Joseph Rauh when he says the Court's striking down New Deal legislation was as bad as the *Dred Scott* decision, that is, "a self-inflicted wound"? Why or why not?
9. In the program, former President John F. Kennedy says, "It's important for us to support the Supreme Court even when we disagree with it." Why is it important? What would happen if some segments of our society chose not to abide by the Court's decisions, or if there were only haphazard support for the Court?
10. Is there a mechanism to enforce Supreme Court decisions? What is it, and how does it work? (It may be helpful to have the students refer to a specific Supreme Court decision when discussing this question.)
11. Why were the Warren Court's decisions so controversial?
12. Why are presidents sometimes surprised by the rulings of the justices they appoint to the Court?
13. Refer to the Focus Question put to the class before viewing the program. Discuss the students' ideas on how the Supreme Court is timeless and how it is also rooted in time.

Research Activities

1. The Taney Court is best known for the *Dred Scott* decision. However, during the Taney years, many other cases also were decided. Examine the record of the Taney Court by looking at some of the major decisions that it handed down. Were there decisions that continued the trend of nation-building started under John Marshall? Were there decisions that changed that trend? Prior to *Dred Scott* did the Court venture into areas not dealt with by the Marshall Court?
2. Compare the size of the three branches of the federal government. How does the judicial branch rank compared to the legislative and the executive branches? What can you say about the power of the judicial branch relative to its size? (Figures can be obtained from the Office of Personnel Management publication *Employment and Trends: Federal Civilian Workforce Statistics*, available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.)
3. Choose a specific constitutional issue (*e.g.*, freedom of speech, voting rights, freedom of religion, due process, etc.), and look at how the issue was dealt with by the Supreme Court under two or three different chief justices in different periods of our nation's history. What were the votes in deciding the issue? What was the reasoning used in the majority opinions? Were there changes in reasoning from the earlier Court(s) to the later Court(s)? What were those changes, and what reasons can you give for them?
4. Students themselves have been directly affected by a number of Supreme Court decisions since the early 1950s, in particular those dealing with desegregation, school prayer, individual rights, and freedom of expression. Divide the class into groups, and assign each group one of the issues mentioned above. Each group should look up a relevant Supreme Court decision and report to the rest of the class on what the decision means for students today.
5. Examine the role of politics in making Supreme Court appointments by looking at the appointments made by a specific president. Who were the justices appointed, and what were the political considerations that led to their appointments? Were the president's political goals achieved through the Supreme Court appointment(s)? Explain.
6. Examine the life of one of the outstanding Supreme Court justices in American history. What attracted the justice to law and the judiciary? What influenced the development of particular views or a judicial philosophy? Describe the justice's major contributions to judicial thought and to American constitutional law.

Program Two

Inside the Supreme Court

Objectives

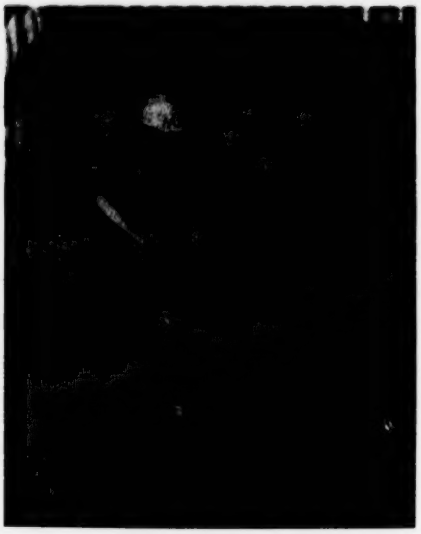
- to survey the step-by-step process of a case working its way through the Court
- to examine the role of the Court's support staff, particularly the law clerks, in the functioning of the Court
- to understand the considerations involved when the justices are deciding a case

Synopsis

This program takes the viewer inside the Supreme Court, showing justices and their law clerks at work. In on-camera discussions, law clerks describe their work which begins in the summer while the justices are away. Through the case of *Edwards* v. *Aguillard*, we will see how a case goes through the Court. Thus, at appropriate times during the program, we see the case arriving at the Supreme Court, ACLU lawyers preparing for the case, and lawyers explaining each side of the case.

Host Paul Duke discusses the conference to decide, when the justices meet in the fall to decide which cases to hear. With Duke are Justices Rehnquist, O'Connor, Blackmun, and Brennan explaining how they "decide to decide." The justices discuss the "rule of four," and Justice O'Connor points out that each petition discussed at the conference receives the attention of each justice.

The justices are then seen working alone in their chambers reading the large stack of briefs given to them each week on cases before the Court.



Chief Justice William H. Rehnquist. Source: Collection of the Supreme Court of the United States

Justices Scalia, Powell, and White discuss the importance of oral argument in deciding a case. White points out that oral argument can change a justice's vote. Scalia emphasizes that cases are decided on their merits, not on the quality of oral argument.

In the conference room of the Court, Paul Duke and Justices Rehnquist, O'Connor, Blackmun, and Brennan discuss the case conference where an initial vote is taken on how to decide a case. The justices explain that the initial vote is often tentative and that many memos are sent back and forth among the justices before a case is finally decided.

The final part of the program picks up the thread of the Edwards case, showing the Court handing down its decision. Some of the closing scenes show members of the press scurrying about in the Press Room of the Court to get the story out.

Previewing Activities

1. Give the students copies of the Glossary so that they may familiarize themselves with some of the legal terms used in the program.
2. Review the structure of the federal court system. (See the chart on page 3.)
3. Give the students copies of the biographies of the justices to read as background information. (See Profiles of the Justices, page 15.)
4. Take a quick survey of the students' current knowledge of the Supreme Court by asking the following questions:
   a. Who is the chief justice of the Supreme Court? When was the appointment made and by whom?
   b. How many justices are there on the Court?
   c. What is the racial, ethnic, and sexual makeup of the Court?
   d. Name as many of the current justices as you can.
   e. How long do Supreme Court justices serve?
   f. Does the Court hear cases in the same way as the lower courts, *i.e.*, as trials by jury?
   g. Name some specific Supreme Court cases that have been decided in the last ten years.
   h. Is the Department of Justice part of the federal judicial system?
5. ***Focus Question.*** (This question should be put to the students to provide a framework for viewing, with discussion taking place after viewing.) Once the Court decides to hear a case, why is there so much emphasis on the *process* of getting the case through the Court, rather than on the *substance* of the case?

Postviewing Discussion

1. Why is secrecy maintained in the Supreme Court's proceedings, particularly in the conference to decide which cases to hear and the conference following oral argument? Is this secrecy necessary? Why?
2. What reforms, if any, would you suggest to ease the workload of the Court?
3. Should television cameras or tape recorders be allowed in the Courtroom during oral argument? Why? What effect might this have on the outcome of cases?
4. Should the law clerks at the Supreme Court have as much responsibility as they do in helping the justices decide which petitions are worthy of their consideration? Why?
5. Why does the press have such limited access to the Court? Why is it rare for the justices to be interviewed by the press?
6. If the justices reflect the society from which they are drawn, as Justice Scalia indicates, isn't there a danger that the Court will read its own sociological or economic views into the Constitution? Explain.
7. What is the difference between law and justice?
8. Discuss the Focus Question put to the class before the viewing of the program.

Research Activities

1. Obtain a list of cases on the docket during the current session of the Supreme Court. Divide the class into groups of "justices." Have each group choose one of the cases and "decide" that case. Students will need to know the arguments for both sides and the questions to be answered in their opinions. Students in the majority should write a majority opinion and the minority should produce a written dissent, based on their knowledge of similar cases and the Constitution.
2. Create a flowchart showing the movement of a case through the Supreme Court. Begin with the arrival of the petition at the Court, and include the actions of the law clerk.
3. Compare the judicial system of the United States with that of another country with a democratic form of government. Take into account the different kinds of courts (*e.g.*, state, provincial, federal); levels of appeal; powers of the courts; the existence of judicial review; the role of the judiciary relative to the executive and to the legislature.
4. In the program, Justice Scalia states that the Court is a reflection of the society in which it functions because its judges are drawn from that society. Choose two Courts from different periods of history, and examine the personal and professional backgrounds of the justices sitting on each Court. How were the justices reflective of society at the time? How did their decisions reflect both their own backgrounds and societal concerns?
5. Role-play a reporter. Choose a specific Supreme Court case and read the entire opinion, including any concurring opinions and dissents. Write a newspaper article reporting the decision and its implications.
6. Even though circuit-riding is no longer required of Supreme Court justices, members of the Court still have circuit duties. What are those duties and how do the justices fulfill them? What are the activities of the chief justice in the role of administrator of the federal court system?

Glossary

amicus curiae "A friend of the court," a person not a party to litigation, who volunteers or is invited by the court to give his or her views on a case

appellate jurisdiction The jurisdiction of a court to hear appeals and review lower court decisions

brief A document prepared by counsel to serve as the basis for an argument in court, setting out the facts and legal arguments in support of his or her case

certiorari, writ of An order from a superior court commanding a lower court to certify and return its records in a case for review

diversity of citizenship jurisdiction The authority of the federal courts to hear suits by citizens of different states

docket An official list of cases to be tried in a court

ex parte From, or on, only one side; application to a court for some ruling or action on behalf of only one party

habeas corpus Literally, "you have the body"; a writ issued to inquire whether a person is lawfully imprisoned or detained; writ demanding that the persons holding a prisoner justify the detention or release the prisoner

in forma pauperis In the manner of a pauper, without liability for the costs of filing cases before a court

justiciable case or **controversy** A case or controversy in which a claim of right is asserted against another who has an interest in contesting it; courts will consider only justiciable controversies, as distinguished from hypothetical disputes

justiciability Capable of being settled by law or by the action of a court

litigant A person engaged in a lawsuit

mandamus, writ of "We command"; an order issued from a superior court directing a lower court or other government authority to perform a particular act

merit The intrinsic right and wrong of a matter, as a law case, unobscured by procedural details, technicalities, personal feelings, etc.

moot Unsettled, undecided; a moot question is also one that is no longer material, or that has already been resolved, and has become hypothetical.

original jurisdiction The jurisdiction of a court of first instance, or trial court; the Supreme Court has original jurisdiction under Article III of the Constitution.

petition A formally drawn up request to a court by someone seeking action or relief

plenary consideration Full consideration; when the Supreme Court grants a case review, it may give it full consideration, permitting the parties to submit briefs on the merits of the case and to present oral arguments, before the Court reaches its decision.

ripe for decision When a case is ready for adjudication; the issues presented must not be hypothetical, and the parties must have exhausted other avenues of appeal.

seriatim Separately, individually, one by one; the Court's practice was once to have each justice give a separate opinion

standing Having the appropriate characteristics to bring or participate in a case; in particular, having a personal interest and stake in the outcome

stare decisis "Let the decision stand"; the principle of adherence to settled cases, the doctrine that principles of law established in earlier cases should be accepted as authoritative in similar subsequent cases

writ An order commanding someone to perform or not perform acts specified in the order

Resource List

Books

Asch, Sidney H. *The Supreme Court and Its Great Justices*. New York: Arco, 1971.

Baum, Lawrence. *The Supreme Court*, 2nd edition. Washington: Congressional Quarterly Press, 1985. Describes the basics of the court's workings.

Cox, Archibald. *The Court and the Constitution*. Boston: Houghton Mifflin, 1987. Describes how the Court has kept the constitution a vital, creative instrument.

Cushman, Robert F. *Leading Constitutional Decisions*, 17th ed. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1987. Supreme Court decisions viewed against the background of history, politics and economics out of which they grew.

de Tocqueville, Alexis. *Democracy in America*. Translated by George Lawrence and edited by J.P. Mayer and Max Lerner. New York, Evanston and London: Harper & Row, 1966.

Friedman, Leon and Israel, Fred L. *The Justices of the United States Supreme Court, 1789-1969: Their Lives and Major Opinions*. New York: R.R. Bowker Co., 1969. A four volume series containing biographical and historical information as well as legal opinions of the justices.

Green, Alan. *Justice for All: A Guide to the Supreme Court of the U.S.* Washington: Benton Foundation in cooperation with the American Bar Association, 1987. (Available for free from C-SPAN, 444 North Capitol St., Suite 412, Washington, D.C. 20001.)

Hamilton, Alexander; Madison, James; and Jay, John. *The Federalist Papers*. With introduction, table of contents and index of ideas by Clinton Rossiter. New York and Scarborough, Ontario: New American Library, 1961.

Harrell, Mary Ann, and Jones, Stuart E. *Equal Justice Under Law: The Supreme Court in American Life*. Washington: The Foundation of the Federal Bar Association in cooperation with the National Geographic Society, 1975.

Kluger, Richard. *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality*. New York: Vintage Books, 1975.

Lewis, Anthony. *Gideon's Trumpet*. New York: Random House, 1964.

Lockhard, Duane and Murphy, Walter F. *Basic Cases in Constitutional Law*. New York: Macmillan, 1980.

Mason, Alpheus T. and Beaney Wm. M. *American Constitutional Law: Introductory Essays and Selected Cases*. 6th ed. Englewood Cliffs, N.J.: Prentice-Hall, 1978. A casebook containing opinions set within a framework of major constitutional issues.

O'Brien, David M. *Storm Center: The Supreme Court in American Politics*. New York: W.W. Norton & Co., 1986.

O'Connor, Alice; Henze, Mary L.; and Merriman, W. Richard, Jr. *Rediscovering the Constitution: A Reader for Jefferson Meeting Debates*. Washington: Congressional Quarterly, Inc., 1987.

Schwartz, Herman. *The Burger Years: Rights and Wrongs in the Supreme Court 1969-1986*. New York: Viking, 1987.

Shnayerson, Robert. *The Illustrated History of the Supreme Court of the United States*. New York: Harry N. Abrams, Inc. in association with the Supreme Court Historical Society, 1986.

Tribe, Laurence H. *Constitutional Choices*. Cambridge: Harvard University Press, 1985. Focuses on the choices that must be made in resolving actual constitutional controversies.

Tribe, Laurence H. *God Save This Honorable Court: How the Choices of Supreme Court Justices Shape Our History*. New York: Random House, 1985.

Witt, Elder. *A Different Justice: Reagan and the Supreme Court*. Washington: Congressional Quarterly, Inc., 1986.

Witt, Elder, ed. *Congressional Quarterly's Guide to the U.S. Supreme Court*. Washington: Congressional Quarterly, Inc., 1979.

Woodward, Bob and Armstrong, Scott. *The Brethren: Inside the Supreme Court*. New York: Avon, 1980.

Wormser, Michael D., ed. *The Supreme Court: Justice and the Law*. 3rd edition. Washington: Congressional Quarterly, Inc., 1983. Concentrates on the Burger Court to illustrate the operation of the separation of powers and the system of checks and balances. Contains summaries of some of the important rulings of the Court from 1969-1983.

Periodicals

Decisions of the United States Supreme Court by the Editorial Staff, United States Supreme Court Reports. Rochester, N.Y.: The Lawyers Cooperative Publishing Co. An annual volume designed to serve as a guide to the work of the Supreme Court during its most recent term. Contains photos and biographies of each Justice, an outline of the high spots of the Term, summaries of decisions, glossary, table of cases, and index.

Preview of the United States Supreme Court Cases. Published September through May by the Public Education Division of the American Bar Association with the cooperation of the Association of American Law Schools and the American Newspaper Publishers Association Foundation. Contact: Public Education Division, American Bar Association, 750 North Lake Shore Drive, Chicago, IL 60611, (312) 988-5729.

Project '87 Publications. A combined effort of the American Historical Association and the American Political Science Association. Project '87 developed materials to enhance education and appreciation of the Constitution. For a complete list of Project '87 print and video materials write to: Project '87, 1527 New Hampshire Ave., N.W., Washington, D.C. 20036. Lists of other teaching resources on the Constitution and the Supreme Court are also available.

United States Reports
Lawyer's Edition of the United States Supreme Court Reports.
Supreme Court Reporter.
These series, issued by commercial publishers, are collections of recent Supreme Court opinions and are often available in large municipal libraries, as well as law libraries and university libraries.

The United States Law Week.
Supreme Court Bulletin.
Both are noteworthy sources of information about the Court and its opinions, and can be found in the reference section of the library.

Film and Video

"A More Perfect Union". Eight 40-minute tapes on the birth of the Constitution, including reports on how landmark Supreme Court decisions have shaped the document's development. From Britannica and CNN (Cable News Network). For information, call toll free: 800/554-9862.

"A Supreme Court Mediagraphy" by Paul Mastrangelo, *Law Library Journal*, Vol. 78: 279, December 1984. This mediagraphy list brings together media materials concerning the Supreme Court and its justices. The list includes 35 mm filmstrips, 16 mm films, videotapes, audiotapes, and phonograph records which are readily available for rent, sale, or lease.

"America & the Courts." Washington: The Cable Satellite Public Affairs Network (C-SPAN), 1985-. A continuing series that explores the relationship between the Administration, the Congress, and the Judiciary through interviews and viewer call-in programs with legal scholars, lawmakers, and journalists, and features live telecasts from the Supreme Court and the U.S. Court of Appeals. For information on video cassettes and special rates for educators and educational institutions, contact the Press and Viewer Information Office, C-SPAN, 444 North Capitol St., Suite 412, Washington, D.C. 20001 or call 202/737-3220.

"American Government Survey." A series on government and politics. Programs #24, 25 and 26 focus on the federal judiciary and the Supreme Court. For information on video cassette availability, contact Dallas Telecourses, Dallas County Community College District, 4343 N. Highway 67, Mesquite, TX 75150, 214/324-7988.

"Constitution: That Delicate Balance." New York: Media and Society Seminars of Columbia University—Graduate School of Journalism, 1984. A series of thirteen one-hour programs on constitutional rights and public policy. For information on video cassettes for educational use contact Films, Inc., 800/323-4222. For program guides and transcripts write: Columbia University, Media and Society Seminars, 204 Journalism, New York, N.Y. 10027.

"Equal Justice Under the Law." Pittsburgh: WQED-TV in association with the U.S. Supreme Court, 1976. A series of six docudramas that examine critical Supreme Court decisions under Chief Justice John Marshall. For information on video cassettes and print materials, contact WQED-TV, Education and Government Projects, 4802 Fifth Avenue, Pittsburgh, PA 15213, or call 412/622-1398.

"Our Living Bill of Rights Series." Seven programs, ranging from 13 to 35 minutes; open-ended case studies on contemporary Constitutional issues. From Britannica; call toll free 800/554-9862.

Chief Justices of the United States

John Jay (1789-1795): Helped set up Supreme Court procedure in formative period.

John Rutledge (1795): Appointed by Washington but not confirmed.

Oliver Ellsworth (1796-1800): Witnessed only a few decisions.

John Marshall (1801-1835): Greatly expanded authority of national government by broadening powers granted it by the Constitution and by emphasizing limits on states. Strengthened judicial branch.

Roger B. Taney (1836-1864): Reversed trend of Marshall Court by stressing protection of states' rights. A Southerner and slaveowner, aroused storm of criticism with decision in *Dred Scott* v. *Sandford* (1857).

Salmon P. Chase (1864-1873): A Republican who favored most postwar aims of his party and thus evaded ruling on constitutionality of Radical Reconstruction. Attempted with limited success to maintain correct trial procedure in Johnson impeachment.

Morrison R. Waite (1874-1888): Through various decisions, strengthened the regulatory power of states.

Melville W. Fuller (1888-1910): Upheld traditional property rights, thus fostering growth of large corporations and restricting unions.

Edward D. White (1910-1921): First chief justice to have served first as associate justice. Established "rule of reason" for regulating business.

William H. Taft (1921-1930): Only former president to serve as chief justice. Instituted changes so Supreme Court could handle case load better. Ruled against curbs on business and child labor.

Charles E. Hughes (1930-1941): Though ruling against the NRA in *Schecter* v. *United States* (1935), upheld most New Deal legislation. Successfully opposed Franklin Roosevelt's 1937 plan to "pack" Supreme Court by adding up to six new justices.

Harlan F. Stone (1941-1946): As associate justice (1925-1941), noted for dissents, along with Justices Holmes and Brandeis, taking liberal stand on social issues. Upheld New Deal measures such as social security.

Frederick M. Vinson (1946-1953): In era of many split decisions, aimed to minimize controversy. Thus postponed hearings on education cases that might have reversed *Plessy*.

Earl Warren (1953-1969): Presided over Supreme Court in time of its greatest influence in changing society. Believed in "judicial activism," with Court moving aggressively against racial discrimination and in favor of legislative reapportionment and rights of accused.

Warren E. Burger (1969-1986): More inclined to "judicial restraint" than his predecessor. Believed in strengthening law enforcement and limiting rights of accused. However, voted with liberals on such issues as legalizing abortion and limiting wiretapping. Urged judicial reforms to ease case load and improve quality of judiciary.

William H. Rehnquist (1986-): A staunch, strict constructionist who takes a literal, narrow approach to questions of individual rights and believes that the Court should exercise its power with great deference to the decisions of Congress, the president, and the states.

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